

The Education of *All* Children with Disabilities: Integrating Home-Schooled Children into the Individuals with Disabilities Education Act*

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The Individuals with Disabilities Education Act was passed in order to advance equal protection as well as adequate education for all children with disabilities through the use of federal funding. A significant number of American children, however, are denied the opportunity to take advantage of such special funding because their parents choose to educate them through alternative, although legally-accepted, means—by home schooling. This note begins with the illustrative case of Hooks v. Clark County School District, in which a home-schooled child was denied subsidized speech therapy services, and ultimately supports the Ninth Circuit's holding that home-educated students currently access IDEA funds only when the applicable state law authorizes such action. After explaining the dramatic increase in participation in and public acceptance of home schooling over the past two decades, and the parallel development of federal legislation to assist the educational opportunities of children with disabilities, this note reasons that home-schooled children with disabilities improperly remain outside the statute's protection of their public and private school counterparts. The author argues that, with the current focus on education reform, now is the prime time for Congress to reexamine the IDEA and integrate home-schooled children into its provisions. The author proposes three options for amending the legislative framework, each of which entails analogizing home-schooled students to private school students and placing varying degrees of pressure upon the states to guarantee change. Finally, the author recognizes the weighty cost considerations that accompany such a funding initiative, but asserts that the need for the statute's uniform application and the need to fulfill the purposes underlying the IDEA, especially the desire to raise competent citizens, outweigh any extra burden that may arise.

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** The Ohio State University Moritz College of Law, Class of 2002. I dedicate this note to my loving parents, without whose constant guidance and support I could not have gotten where I am today, and to my "little" sister who is a source of joy and inspiration. I would like to thank Melissa Jamison for steering me towards this topic and Amee McKim and Stephanie Smith for encouraging me to complete this note in spite of my bouts of frustration. Finally, I give special thanks to my history professors at Oklahoma Baptist University for preparing me for this endeavor.

Today, education is perhaps the most important function of state and local governments. . . . It is required in the performance of our most basic public responsibilities[;] . . . [i]t is the very foundation of good citizenship. . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.¹

If our country fails in its responsibility to educate every child, [we're] likely to fail in many other areas. But if we succeed in educating our youth, many other successes will follow throughout our country and in the lives of our citizens.²

I. INTRODUCTION

In November 2000, just over half of the registered voters in America rushed to the polls and voted for the candidate who best supported the issues they viewed as most imperative to America's future success.³ Almost one-third of these voters expressed that the new president should work first on improving education.⁴ Subsequently, President Bush and the 107th Congress have embraced this public mandate for bipartisan education reform.⁵

No two areas of education have changed more over the most recent decades

¹ Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

² President George W. Bush, *Foreword to Transforming the Federal Role in Education So That No Child is Left Behind* (Jan. 23, 2001), at <http://www.whitehouse.gov/news/reports/text/no-child-left-behind.html> (discussing the Bush Administration's agenda for bipartisan education reform).

³ Lee Walczak, *What's the Mandate?*, BUS. WK., Nov. 20, 2000, at 36.

⁴ See *id.* at 40 (displaying information from the ABC News Exit Polls). When asked what the new president should do first, 30% of voters chose education as topping all other concerns, such as social security and prescription drug costs. *Id.*

⁵ In fact, within its first month, the Bush Administration, focusing on bipartisan education reform, sent its education proposals to Congress. See Press Release, Letter from the President to the Speaker of the House of Representatives and the President of the Senate (Jan. 23, 2001), at <http://www.whitehouse.gov/news/releases/2001/01/200101123.html>. Bush's budget also highlighted the priority of education. See A Blueprint for New Beginnings: A Responsible Budget for America's Priorities: Major Policy Initiatives: Strengthen and Reform Education (Feb. 28, 2001), at <http://www.whitehouse.gov/news/usbudget/blueprint/bud03.html> ("Bipartisan education reform is the cornerstone of President Bush's Administration.").

The House and Senate have both passed Bush's education plan and are currently (as of the time this note went to publication) in conference committee to work out the finishing touches. See Press Release, House, Senate Education Leaders Begin Final Work on President Bush's Education Plan (July 19, 2001), at http://www.house.gov/ed_workforce/press/press107/hr1conf71901.htm. This final legislation, dubbed the "No Child Left Behind Act," will be an amendment to and a six-year reauthorization of the Elementary and Secondary Education Act. See Press Release, House-Senate Education Conference Makes Early Progress (Aug. 1, 2001), at http://www.house.gov/ed_workforce/press/press107/nclbconf8101.htm.

than home education⁶ and disabilities education. Although home schooling has deep roots in American history,⁷ a revival of the home school method began in the early 1980s, and the movement continues to gain momentum.⁸ Likewise, disability education has changed most dramatically since the mid-1970s when Congress first enacted the Individuals with Disabilities Education Act (IDEA).⁹

These two distinct educational areas, home education and disabilities education, clashed in a recent Ninth Circuit decision, *Hooks v. Clark County School District*.¹⁰ In this case, parents of a home-educated student filed suit after the school district refused to fulfill the parents' request for subsidized speech therapy services.¹¹ The court recognized that the case presented "novel issues" regarding interpretation of the IDEA and the denial of benefits to home-educated children.¹² However, the court declined to reimburse the parents, finding that the IDEA gives discretion to the states to determine individually whether to include home education as an IDEA-qualifying "private school," which Nevada law did

⁶This note uses the terms "home education," "home schooling," and "home instruction" interchangeably.

⁷See CHRISTOPHER J. KLICKA, *THE RIGHT TO HOME SCHOOL: A GUIDE TO THE LAW ON PARENTS' RIGHTS IN EDUCATION* xvi (1998) ("[H]ome schooling was one of the major forms of education until the early 1900s.").

⁸Compare Diane Kiesel, *School at Home: Battles Rage over State's Roles*, 70 A.B.A. J. 28, 28 (1984) (estimating that "children in some 10,000 to 20,000 families" were being home educated), with Lisa M. Lukasik, Comment, *The Latest Home Education Challenge: The Relationship between Home Schools and Public Schools*, 74 N.C. L. REV. 1913, 1913 (1996) (reporting an estimated one million home-schooled children), and Peter T. Kilborn, *Learning at Home, Students Take the Lead*, N.Y. TIMES (late edition), May 24, 2000, at A1 (showing that the most recent estimates have risen to 1.3 million to 1.7 million children, comprising 2-3% of all school-aged children).

⁹Pub. L. No. 94-142, 89 Stat. 773 (1975) [hereinafter IDEA] (codified as amended at 20 U.S.C. §§ 1400-1487 (1994 & Supp. IV 1998)). Pursuant to amendments in 1990, Congress changed the original name of this legislation, the Education of All Handicapped Children Act, to its current designation as the Individuals with Disabilities Education Act. See Heidi Hoffercker Andry, Casenote, 62 TENN. L. REV. 313, 319-20 (1995).

Although the IDEA constitutes the primary source of federal protection for students with disabilities, disabilities education is also impacted by section 504 of the Rehabilitation Act of 1973 as well as the Americans with Disabilities Act of 1990 (ADA). See ALLAN G. OSBORNE, JR., *LEGAL ISSUES IN SPECIAL EDUCATION* 225-37 (1996). Section 504 represents the first civil rights legislation "that specifically guaranteed the rights of individuals with disabilities," prohibiting discrimination "by any recipient of federal funds in the provision of services or employment." *Id.* at 13. However, application of section 504 protection arises only if the person has a "physical or mental impairment that substantially limits one or more of the person's major life activities." *Id.*; see also 28 C.F.R. § 41.31 (2000). The ADA prohibits discrimination against disabled individuals in the private sector, intending to extend section 504 protection to all programs and activities regardless of their receipt of federal funding. OSBORNE, *supra*, at 13. This note does not attempt to deal with any possible issues concerning section 504 or the ADA.

¹⁰228 F.3d 1036 (9th Cir. 2000), *cert. denied*, 121 S. Ct. 1602 (2001).

¹¹*Id.* at 1038.

¹²*Id.* at 1037. See *infra* note 25 (presenting the subsequent change to Nevada law that allows home-educated students to receive special education services).

not permit at the time.¹³

This note examines the intersection of home schooling, as governed by state law, with disabilities education, as governed primarily by federal law. Part II presents an overview of *Hooks* and the Ninth Circuit's principal contentions concerning the interplay between home schooling and the IDEA, creating a springboard to the remainder of the note. Part III summarizes the history of compulsory attendance laws and the evolution of home education, discussing the current interaction between home and public schools and how the IDEA statute fits into the picture. Part IV outlines the IDEA as first enacted and the impact of the 1997 Amendments, especially the portions that relate to private schools. Part V presents a statutory analysis of the IDEA to determine its treatment of home schools—ultimately calling for legislative action because the current statute does not satisfactorily provide for home schooling within its public versus private school framework. This section focuses on Congress' over-arching purpose to assist disabled students and argues that home education should be treated similarly to private school education and therefore entitled to federal funding. Part VI provides several legislative suggestions to better serve the needs of *all* disabled school-aged children.

II. *HOOKS V. CLARK COUNTY SCHOOL DISTRICT*

A. *Factual Background*

The Hooks family received a home-education exemption from the Nevada compulsory attendance law in 1994, allowing them to exercise their choice to home school their son Christopher instead of enrolling him in a local public school.¹⁴ In August 1996, Christopher became medically eligible for speech therapy services.¹⁵ When his parents re-applied for the home-education exemption for the next school year, they additionally applied for subsidized speech therapy services, even though they did not claim that Christopher's home education was necessary because of his disability.¹⁶ The school district "opted"

¹³ *Id.* at 1037–38; *see also* Forstrom v. Byrne, 775 A.2d 65, 69 (N.J. Super. Ct. App. Div. 2001) (adopting and applying *Hooks*).

¹⁴ *Hooks*, 228 F.3d at 1038.

¹⁵ *Id.* at 1037–38.

¹⁶ *Id.* Christopher needed speech therapy assistance. *Id.* If Christopher had been forced to stay home to be educated due to a severe disability (for instance, one that made it difficult for Christopher to be transported or to study in a normal classroom), the state probably would have accepted responsibility for his special education services. Many states allow exceptions for "homebound" children when the IEP specifically provides for the homebound instruction as a means to best serve the child's needs. *See, e.g.,* Brinkley Sch. Dist., 33 IDELR 205 (Sept. 25, 2000) (quadriplegic student to receive temporary homebound instruction); M.C. v. Voluntown Bd. of Educ., 33 IDELR 91 (Sept. 1, 2000) (student with attention deficit hyperactivity disorder and learning disability to receive homebound instruction due to severe depression); *Indep. Sch. Dist. No. 284 v. A.C.*, 32 IDELR 143 (Apr. 18, 2000) (student with emotional and behavioral disorder); *Vigo County Sch. Corp.*, 33 IDELR 55 (Apr. 5, 2000) (autistic student); *Boston Pub.*

not to provide the requested services,¹⁷ suggesting instead that the parents either: (1) file with the Board of Trustees for an exception from the accepted school policy¹⁸ or (2) enroll Christopher in a public school in which he would have an individualized education program¹⁹ tailored to meet his needs.²⁰

The Hooks, claiming protection under the IDEA, instead filed a complaint with the Nevada Department of Education, which subsequently dismissed the claim after relying on a policy letter from the United States Office of Special Education Programs (OSEP).²¹ OSEP deferred to state law when deciding whether home education qualified as a private school under the IDEA.²² The Nevada Department of Education supported the school district's policy, and the Hooks proceeded to file a federal action, claiming violations of the IDEA and the Fourteenth Amendment of the United States Constitution.²³ The parents sought declaratory relief of Christopher's entitlement to speech therapy services,

Sch., 32 IDELR 109 (Jan. 27, 2000) (student with severe behavioral problems); Mead (Wash.) Sch. Dist. No. 354, 32 IDELR 123 (July 19, 1999) (student on temporary medical leave of absence).

¹⁷ Hooks, 228 F.3d at 1038. The school's decision is no surprise. When states have an option—rather than a mandated obligation—to spend additional money for a student, they tend to find ways to keep their money. See *infra* note 133 and accompanying text (discussing how local educational agencies have no incentive to use local and state funding for the special education of private school students because they are not obligated to do so).

¹⁸ Hooks, 228 F.3d at 1038. The school district's policy asserted that, according to Nevada law, students granted the home-education exception did "not have access to instruction and/or ancillary services with the public schools." *Id.*

¹⁹ The term "individualized education program," otherwise known as an "IEP," means a written statement that is developed, reviewed, and revised for each child with a disability. 20 U.S.C. § 1401(11) (1994 & Supp. IV 1998). The IEP must include, among other things, statements regarding: (1) the child's present level of educational performance; (2) the measurable annual goals, including benchmarks or short-term objectives; (3) the special education, related services, and supplementary aids to be provided to the child; (4) any modifications in the state or district assessments of student achievement needed in order for the child to participate; and (5) the anticipated frequency, location, and duration of the services provided. 20 U.S.C. § 1414(d) (1994 & Supp. IV 1998).

²⁰ Hooks, 228 F.3d at 1038.

²¹ *Id.* The Office of Special Education Programs [hereinafter OSEP] was established within the larger Office of Special Education and Rehabilitative Services of the Department of Education as the "principal agency . . . for administering and carrying out" the IDEA and "other programs and activities concerning the education and training of individuals with disabilities." 20 U.S.C. § 1402 (1994 & Supp. IV 1998). For additional information or publications from OSEP, including questions and answers regarding the application of the IDEA, see generally United States Department of Education, Office of Special Education and Rehabilitative Services, Office of Special Education Services, at <http://www.ed.gov/offices/OSERS/OSEP/index.html>, last modified on Aug. 21, 2001.

²² Hooks, 228 F.3d at 1038. OSEP's letter "declare[d] that States have discretion to determine whether or not home education qualifies as a 'private school or facility'" within the IDEA. *Id.*

²³ *Id.* The Hooks brought their Fourteenth Amendment due process and equal protection claims pursuant to 42 U.S.C. § 1983. *Id.* at 1041.

reimbursement for private speech services already provided, and attorneys' fees.²⁴ The district court granted summary judgment in favor of the school district, and the parents appealed. The court dealt only with claims to reimbursement because Nevada changed its law in the interim, thus providing for future services to Christopher as an eligible home-educated student.²⁵

B. Court Discussion

The court examined the IDEA and the accompanying regulations, finding no provision for children who are not enrolled in either public or private school.²⁶ The Hooks argued that Christopher fit into the category of children placed by their parents in a "private school."²⁷ Because the court found no definition for "private school or facility" within the IDEA or the accompanying regulations, it followed the direction of the OSEP policy letter²⁸ and applied Nevada law to determine Christopher's eligibility for IDEA-funded services as a home-educated student.²⁹ The Nevada law in force at the time defined "private school" so as to exclude home-educated children.³⁰

The Hooks then argued that the Nevada law and school district policy violated the IDEA, and the court responded with a statutory analysis of the language "private school or facility" to emphasize that the "IDEA leaves discretion to the [s]tates."³¹ First, the court examined the common meaning of the phrase, stating that the plain language "does not require that exempted home education qualify as a 'private school or facility.'"³² Second, the court turned to

²⁴ *Id.* at 1038.

²⁵ *Id.* at 1038–39. The new Nevada law provides that "the board of trustees of each school district *shall* provide programs of special education and related services for children who are exempt from compulsory attendance pursuant to the home-education exemption and receive instruction at home." *Id.* (discussing Nevada Revised Statute Annotated 392.070(2)) (emphasis added). Thus, the parents' claim for declaratory relief that Christopher qualified for services was summarily remanded for action in light of the new law. *Id.* at 1039.

²⁶ *Id.* The court identified only three categories of qualifying children under the IDEA: (1) students enrolled in public schools; (2) students enrolled in private schools by a public agency; and (3) students voluntarily enrolled in private schools by their parents (unilateral placement). *Id.*

²⁷ *Hooks*, 228 F.3d at 1039.

²⁸ See *supra* note 22 and accompanying text (presenting OSEP's policy statement).

²⁹ *Hooks*, 228 F.3d at 1039.

³⁰ *Id.* The law stated that "private schools" means "private elementary and secondary educational institutions." *Id.*; see NEV. REV. STAT. ANN. 394.103 (Michie 2000) ("The term ["private schools"] does not include a home in which instruction is provided to a child who is excused from compulsory attendance . . .").

³¹ *Hooks*, 228 F.3d at 1040.

³² *Id.* According to *Webster's Dictionary*, a "school" is defined as an "institution for instruction of children" and an "institution" is an "established organization or foundation, esp[ecially] one dedicated to public service." *Id.* (emphasis added). *Black's Law Dictionary* presents similar definitions. *Id.*; see also *Forstrom v. Byrne*, 775 A.2d 65, 70–73 (N.J. Super. Ct. App. Div. 2001) (discussing in detail the traditional meaning of "private school" and why it excludes home-schooled children under New Jersey state law).

OSEP's interpretation, because it is the agency "charged with implementing and enforcing the IDEA."³³ Third, the court relied on the legislative enactment doctrine in finding that Congress ratified OSEP's views of state deference within its 1997 amendments to the IDEA.³⁴ Finally, the court asserted that discretion left to the states accords with Congressional intent of making special services available to disabled students.³⁵ The school district satisfactorily provided a "free appropriate public education"³⁶ to Christopher, but the Hooks rejected the offer, therefore rejecting the attendant subsidized special services.³⁷ The court then finished its discussion by dismissing the Hooks' § 1983 claims, rejecting the argument that the school district's policy violated both due process and equal protection principles of the Fourteenth Amendment of the United States Constitution.³⁸ The court held that, because no fundamental right or inherently suspect classification was implicated, the school board's regulation fulfilled its limited burden of bearing a "rational relation to a legitimate governmental purpose."³⁹

³³ *Hooks*, 228 F.3d at 1040; see also *supra* note 21 and accompanying text (showing OSEP's authority as the regulating agency for the IDEA).

³⁴ *Hooks*, 228 F.3d at 1040. The amended IDEA defines "elementary school" and "secondary school" as providing education as "determined under State law." *Id.*; see also 20 U.S.C. § 1401 (1994 & Supp. IV 1998). The "reenactment rule" holds that when "Congress reenacts a statute without making any material changes in its wording, the Court will often presume that Congress intends to incorporate authoritative agency and judicial interpretations of that language into the reenacted statute." WILLIAM N. ESKRIDGE, JR., & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 1021 (3d ed. 2001).

³⁵ *Hooks*, 228 F.3d at 1041.

³⁶ A "free appropriate public education," according to the IDEA, means "special education and related services" that:

(A) have been provided at public expense, under public supervision and direction, and without charge;

(B) meet the standards of the State educational agency;

(C) include an appropriate preschool, elementary, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under section 1414(d).

20 U.S.C. § 1401(8) (1994 & Supp. IV 1998). However, this somewhat ambiguous term has been the source of much debate. See, e.g., *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982) (presenting the Supreme Court's attempt to interpret the meaning of "free appropriate public education" after the lower courts disagreed). The word "public" within this phrase has been treated as "a term of art which refers to 'public expense,' whether at public or private schools." *Peter v. Wedl*, 155 F.3d 992, 999 (8th Cir. 1998).

³⁷ *Hooks*, 228 F.3d at 1041.

³⁸ See *id.* at 1041-43.

³⁹ *Id.* at 1041. The court's conclusion that no fundamental right was implicated is debatable. The courts and many academics have addressed this issue as one of parental rights.

III. HOME SCHOOLING: AN ALTERNATIVE TO THE PUBLIC SCHOOL SYSTEM

Some people may view home schooling as an inferior method of education used only by fanatical parents attempting to isolate their children. However, parent-directed education has existed from the founding of this country⁴⁰ and now encompasses a diverse community of approximately one and a half million children.⁴¹ This section explains the evolution of home education from its traditional beginnings⁴² to its modern acceptance as a viable alternative to the public school system,⁴³ describing the states' interplay with and accommodations for home-educated children.⁴⁴

A. Compulsory Attendance Laws and the Development of Home Schooling

1. Traditional Landscape

Home schooling played a significant role in the early years of American

See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972) ("[W]hen the interests of parenthood [the rights of parents to direct the upbringing of their children] are combined with a free exercise claim[.], . . . more than merely a 'reasonable relation to some purpose within the competency of the State' is required to sustain the validity of the State's requirement under the First Amendment."); KLINKA, *supra* note 7, at 33 (emphasizing that states cannot "arbitrarily regulate and limit parental control of the process of education" because it "results in the infringement of the fundamental rights of the parents"); Michael E. Chaplin, Comment, *Peterson v. Minidoka County School: Home Education, Free Exercise, and Parental Rights*, 75 NOTRE DAME L. REV. 663, 683 (1999) (noting that it is "possible to challenge a neutral and generally applicable law when the religiously motivated challenger demonstrates that the law affects 'the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press . . . or the right of parents . . . to direct the education of their children'" (quoting *Employment Div. v. Smith*, 494 U.S. 872, 881 (1990))); Lukasik, *supra* note 8, at 1921-41 (providing an overview of the principle sources of authority—the Fourteenth Amendment's Due Process Clause, the First Amendment, the implied right to privacy and express right of privacy under the Fourth Amendment, the Ninth Amendment—from which parents argue for the fundamental constitutional right to home school their children); Jack MacMullan, Comment, *The Constitutionality of State Home Schooling Statutes*, 39 VILL. L. REV. 1309, 1316-17 (1994) (focusing on two parental interests—"the right of parents to control the upbringing of their children and the right of parents to the free exercise of religion"—as the basis for the Court's limitations on State power to regulate education). But see Ingrid Carlson Barrier, *Education: Tenth Circuit Survey*, 76 DENV. U. L. REV. 785, 798-99 (1999) ("An examination of the relevant case law, however, leads to the conclusion that 'there is no broad, if any, fundamental nonreligious right to home instruction.'" (quoting Perry A. Zirkel, *The Case Law Concerning Home Instruction*, 29 EDUC. L. REP. 9, 11 (1986)); *infra* note 54 (addressing the countervailing interests of the State for the education of America's children).

⁴⁰ See *infra* notes 45-49 and accompanying text.

⁴¹ Kilborn, *supra* note 8, at A1 (estimating that between 1.3 to 1.7 million children, comprising two to three percent of all school-aged children, are home-educated).

⁴² See *infra* Part III.A.1.

⁴³ See *infra* Part III.A.2.

⁴⁴ See *infra* Part III.B.

history.⁴⁵ Compulsory education statutes went into effect as early as 1642,⁴⁶ even though the first compulsory attendance law was not passed until 1852,⁴⁷ leading, in the interim, to parent-directed education through nonpublic means.⁴⁸ In fact, hundreds of this country's greatest leaders were either partly or completely home schooled.⁴⁹ However, the "changing demographics of the nation"⁵⁰ and the growth in government⁵¹ during the late nineteenth and early twentieth centuries led states to require attendance at public schools. This shift away from the home resulted in changed ideas concerning the proper parental role in education.⁵²

Today, all fifty states have compulsory attendance statutes that typically require "public or approved non-public school attendance for children ranging from ages five to sixteen."⁵³ Courts usually uphold these laws as a legitimate use of the states' police power.⁵⁴ Before accommodations were made for home

⁴⁵ See Lukasik, *supra* note 8, at 1917. But see WILLIAM M. GORDON ET AL., *THE LAW OF HOME SCHOOLING* 5 (1994) (agreeing that home school "played a significant role in the early years" but asserting that "home schooling as practiced in early American history and as engaged in today are far from the same reality"—the past practice resulting from necessity rather than choice).

⁴⁶ The Massachusetts Bay Colony established the first compulsory education law which required parents "to provide their children with a fundamental education that included reading, religion and a trade." MacMullan, *supra* note 39, at 1313.

⁴⁷ Massachusetts established this first "modern" compulsory school attendance law that was "based upon educational aims" and "rooted in a variety of state concerns." GORDON ET AL., *supra* note 45, at 7 (arguing that social reform moved education from the home into the public school). These concerns included the desire "to teach children to read, write, and compute[;] . . . to eliminate truancy; and to obviate abuses in child labor." Chaplin, *supra* note 39, at 667–68 (quoting GORDON ET AL., *supra* note 45, at 6).

⁴⁸ See Mark Murphy, Note, *A Constitutional Analysis of Compulsory School Attendance Laws in the Southeast: Do They Unlawfully Interfere with Alternatives to Public Education?*, 8 GA. ST. U. L. REV. 457, 458 (1992) (noting that between 1642, when the first compulsory education laws went into effect, and 1852, when compulsory school attendance first became mandatory, "education was legally required and, in most locales, had to be accomplished through nonpublic means").

⁴⁹ KLICKA, *supra* note 7, at xvi (listing a number of great leaders, including eleven presidents, authors, statesmen, and military commanders); Chaplin, *supra* note 39, at 667 (same).

⁵⁰ MacMullan, *supra* note 39, at 1313 (attributing compulsory attendance statutes to rapid urbanization and mass immigration which "resulted in the need to educate very large and diverse populations").

⁵¹ Chaplin, *supra* note 39, at 667 (attributing compulsory attendance laws to the growth in government and state responsibility with the "natural outcome of . . . an increase in laws designed to regulate education").

⁵² Lukasik, *supra* note 8, at 1920 ("Naturally, as states' responsibility for education expanded, ideas about parental roles in education changed. . . . [and] parents' obligations to provide education for their children were relegated to 'secondary' status.").

⁵³ GORDON ET AL., *supra* note 45, at 7 (noting that failure to comply with these statutes can result in criminal penalties for the parents). In fact, these statutes were in effect by the end of World War I. Lukasik, *supra* note 8, at 1919.

⁵⁴ GORDON ET AL., *supra* note 45, at 8. Under the Tenth Amendment, the states retain power over education and "assume responsibility for the public welfare." Lukasik, *supra* note 8,

education in the 1980s, most families were either forced to qualify as a private school or have a parent certified to teach as a private tutor.⁵⁵

2. Modern Landscape

Although the revival of home schooling began as a counter-cultural movement in the 1960s,⁵⁶ it took root as a religious-conservative movement in the 1980s⁵⁷ and blossomed into an increasingly diverse⁵⁸ and mainstream⁵⁹ movement during the 1990s. While the primary motivation for home schooling still remains ideological,⁶⁰ parents increasingly choose to home school their children due to concerns of pedagogy,⁶¹ school safety,⁶² and quality of

at 1943. Because the United States Constitution does not mention education, authority of education became reserved in the states. *See* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). The Supreme Court established early that "no question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, . . . [and] to require that all children of proper age attend some school." *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534 (1925). The states additionally claim authority to regulate education through their *parens patriae* power, the common law doctrine that views the state as the "parent of the country." GORDON ET AL., *supra* note 45, at 1; *see also* Lukasik, *supra*, at 1943-44 ("The *parens patriae* power refers 'traditionally to the role of the state as sovereign and guardian of persons under a legal disability,' including juveniles.") (quoting *West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1089 (2d Cir. 1971)). States have articulated three "compelling state interests" that justify education regulation: (1) preparation of intelligent citizens who participate effectively in the country's political system; (2) preparation of self-reliant and self-sufficient citizens; and (3) preparation of "culturally-viable" citizens. Lukasik, *supra*, at 1945-46. However, the state interest in controlling education is not absolute. MacMullan, *supra* note 39, at 1316 (recognizing that the state interest is strong, but it "is subject to a balancing process when it infringes upon the fundamental rights and interests of citizens").

⁵⁵ KLICKA, *supra* note 7, at 99 ("[M]ost compulsory attendance laws required children to attend either public school or private school.").

⁵⁶ *See* Selwyn Crawford, *Home Is Where the Class Is; More and More Parents are Teaching Their Kids Themselves*, DALLAS MORNING NEWS, Dec. 24, 2000, at 1J ("Contrary to popular belief, the modern-day movement began not with religious conservatives, but with counter-culture left-wingers of the 1960s.").

⁵⁷ Kilborn, *supra* note 8 ("Home schooling took hold in the 1980's [sic], largely among fundamentalists and religious conservatives who were fleeing the liberal education offered in public schools.").

⁵⁸ Carolyn Kleiner, *Home School Comes of Age*, U.S. NEWS & WORLD REP., Oct. 16, 2000, at 52. The students and parents "run the gamut of educational, economic, religious, ethnic, and geographic variations." *Id.*

⁵⁹ Barbara Kantrowitz & Pat Wingert, *Learning at Home: Does It Pass the Test?*, NEWSWEEK, Oct. 5, 1998, at 64, 66 (discussing the increasing popularity of home schooling throughout the country).

⁶⁰ KLICKA, *supra* note 7, at 2 (stating that the primary reason for home schooling is religious); *see also* GORDON ET AL., *supra* note 45, at 2-3 (stating ideological reasons, mainly religious, dominate the area of home schooling).

⁶¹ *See* GORDON ET AL., *supra* note 45, at 2 (describing the growth in more unstructured approaches to education). The unstructured approach commonly referred to as "unschooling"

education.⁶³ In spite of criticism,⁶⁴ home-educated students tend to perform as well or better on standardized tests than their public or private school counterparts⁶⁵ and equally pursue post-secondary education.⁶⁶

Similar to the modern increase among the general public as to the acceptance of home schooling as an alternative to public education, state legislation has dramatically changed in this area since the 1980s.⁶⁷ All fifty states now accept home-based education as a legal option,⁶⁸ although subjecting it to varying

focuses on independent learning, using children's strengths, interests, and talents to guide education instead of imposing conventional curriculum. Kilborn, *supra* note 8, at A1. In fact, "education experts attribute most of the [current] growth to unschooling, the antithesis of the religion-based image of home schooling." *Id.* Many parents also want their children "to have the freedom to learn at their own pace." Debbie Cafazzo, *Home-Schooling Gains More Diverse Appeal*, NEWS TRIB. (Tacoma, Wash.), Aug. 9, 1999, at B1.

⁶² See Cafazzo, *supra* note 61 (describing how "school safety has become a paramount issue," causing parents to turn to home-schooling to avoid, among other things, gangs, drugs, and peer pressure). Safety concerns rose remarkably in the wake of the deadly school shootings across the country. See, e.g., Mindy Sink, *Shootings Intensify Interest in Home Schooling*, N.Y. TIMES (late edition), Aug. 11, 1999, at B7 (explaining how inquiries to home education groups swelled in the weeks after the Columbine High School shootings).

⁶³ See KLIKA, *supra* note 7, at 3 (noting that parents worry about the academic decline in the public schools). Hundreds of studies recognize that the American public schools, ranking nineteenth of all industrial nations in reading, writing, and arithmetic, are "in sad shape." *Id.* at 4-5; see also William C. Symonds et al., *How to Fix America's Schools*, BUS. WK., Mar. 19, 2001, at 66 (discussing the poor placement of American schools internationally and suggesting ways to make the American educational reform crusade successful).

⁶⁴ See Kilborn, *supra* note 8, at A19 (listing several of the most common criticisms of home schooling: isolation of children; discouraging social development and teamwork skills; legalizing truancy). But see KLIKA, *supra* note 7, at 17-20 (listing several benefits of home schooling: better literacy; efficient use of time; personal attention and tailored instruction; more hands-on experiences; absence of negative peer pressure).

⁶⁵ Kleiner, *supra* note 58, at 53 (describing that studies show that home-schooled children often outperform their peers on standardized achievement tests). For example, in the year 2000, home-schooled students averaged 1100 points on the SAT, 81 points higher than the national mean. *Id.* At least nine state departments of education and numerous independent studies report similar results. KLIKA, *supra* note 7, at xv.

⁶⁶ Catherine Candisky, *Alternative Forms of Schooling Can Be Good Fit, Forum Told*, COLUMBUS DISPATCH (Ohio), Dec. 7, 2000, at 7C ("More than 800 colleges accept home-schooled students and more than two-thirds [of these students] pursue post-secondary educations—about the same as in public schools."); see also KLIKA, *supra* note 7, at xv (noting that home-educated students are being accepted into hundreds of colleges and universities nationwide).

⁶⁷ KLIKA, *supra* note 7, at 157 (observing that as of 1980, only three states had statutes recognizing the right to home school).

⁶⁸ *Id.* at 157-64. Thirty-seven states now statutorily allow "home instruction" or "home schooling" as an alternative means of satisfying school attendance, provided certain requirements are met. *Id.* at 158 (listing the states by name). Notably, all but one of these states (North Dakota) allow parents to teach with nothing more than a high school diploma. *Id.* at 161. The remaining thirteen states do not specifically address home schooling, but these states allow home schooling under other provisions. *Id.* Twelve states allow home schools to operate as "private" schools as long as certain subjects are taught for a specific time period. *Id.* (listing the

degrees of regulation.⁶⁹ The various state approaches can be categorized generally as those providing for: (1) notice and/or approval requirements,⁷⁰ (2) teacher qualifications,⁷¹ and (3) student testing.⁷² Courts tend to uphold these common state controls placed on home schooling as long as the requirements are "reasonable governmental regulations."⁷³

B. Current State Accommodations and the Interplay Between Home and Public Schools

Now that home educators have succeeded in gaining their independence from compulsory attendance statutes and have become accepted as a legitimate educational alternative to traditional schools,⁷⁴ many seek admittance of their pupils back into the public schools "on their own terms."⁷⁵ Home-schooled students now pursue opportunities to enroll in public school classes part-time,⁷⁶ or

states). One state (Oklahoma) specifically protects home-educated students because it allows "other means of education" to be provided outside the public school system. *Id.* at 163. For a state-by-state breakdown of the treatment of home schooling, including the most recent legislation, see CHRISTOPHER J. KLIKA, HOME SCHOOLING IN THE UNITED STATES: A LEGAL ANALYSIS (2001) (updated annually).

⁶⁹ Kleiner, *supra* note 58, at 54. See generally MacMullan, *supra* note 39, at 1336-49 (discussing states' various statutory approaches regarding notice and approval procedures, time and curriculum requirements, teacher qualifications, and methods of academic assessment for home schooling).

⁷⁰ GORDON ET AL., *supra* note 45, at 29-36 (stating that courts ordinarily uphold these statutes because they make modest demands upon parents). "The statutes usually call for one or more of the following: notice to an education official of the intent to home school; an instructional calendar; a listing of instructional materials; and provisions for the assessment" of students' progress. *Id.* at 36.

⁷¹ *Id.* at 36-45 (stating that these requirements vary widely from state to state, and courts more closely scrutinize the provisions).

⁷² *Id.* at 45-48 (showing that courts usually uphold these testing requirements for home-educated students as long as they "are not significantly greater than they are for other students"). These statutes range from mandating standardized achievement tests to including these tests as an option to giving parents the sole responsibility of evaluation. *Id.* at 45. Some states also look for signs of "adequate progress" from the student. KLIKA, *supra* note 7, at 161.

⁷³ See, e.g., *Murphy v. Arkansas*, 852 F.2d 1039 (8th Cir. 1988) (upholding the Arkansas Home School Act against constitutional challenge as a "reasonable governmental regulation"). This home school provision required annual testing of home-schooled children even though no other statute required similar testing of public, private, or parochial school students. *Id.* at 1040-41. The court stressed that although "parents have a constitutional right to send their children to private schools . . . they have no constitutional right to provide their children with private school education unfettered by reasonable government regulation." *Id.* at 1044 (quoting *Runyon v. McCrary*, 427 U.S. 160, 178 (1976)).

⁷⁴ See *supra* notes 67-73 and accompanying text.

⁷⁵ Lukasik, *supra* note 8, at 1957 ("[A]fter years in the courtrooms of America seeking independence from public schools, home educators may soon be back in the court seeking admission to those schools on their own terms.").

⁷⁶ See, e.g., Peggy McCarthy, *Learning at Home, Playing at School*, N.Y. TIMES (late edition), Nov. 16, 1997, at CT1 (describing how a Connecticut school district refused

to join the local public school athletic team,⁷⁷ musical group,⁷⁸ or other organized extracurricular activity.

Considerable debate rages over whether those parents taking advantage of the home school exceptions to compulsory attendance statutes should completely sacrifice all public school services.⁷⁹ Generally, home educators argue that, as taxpayers supporting public schools, they "should have access to school programs" just as they do to other public facilities such as libraries.⁸⁰ Those opposed to such participation by home-educated students contend that home educators should not be able to "have it both ways."⁸¹ In fact, the Supreme Court has never ruled that parents have an absolute right to dictate their child's education in its totality.⁸² Therefore, parents desiring to complement their child's home education remain at the discretionary mercy of local school officials⁸³ and "must rely on the state legislatures and local policies, not federal law."⁸⁴ This restriction means that parents wishing to home school their children may "continue to struggle to enroll their children in public school programs on a part-time basis"⁸⁵ because local and state agencies may legally ban home-schooled

permission to a home-educated student to take a chemistry class at the local high school or to even utilize the chemistry lab facilities); *see also* Barrier, *supra* note 39, at 799–802 (describing the Tenth Circuit's decision to uphold a school district's resolution to deny a home-educated student the opportunity to attend classes on a part-time basis). *But see infra* notes 88–89 and accompanying text (describing how the state of Washington statutorily allows for home-educated students to take classes part-time).

⁷⁷ *See* John Cloud, *Outside, Wanting In: Home Schoolers Won the Right to Escape the Public System. But Should They Be Able to Play on Its Teams?*, TIME, Dec. 27, 1999 (describing a suit by seven home-schooling families who are fighting for the right of their children to play on public school athletic teams).

⁷⁸ *See* McCarthy, *supra* note 76 (describing how school officials of an elementary school permitted a home-educated student "to take trumpet lessons at the public school and play in its band").

⁷⁹ *Id.*

⁸⁰ *Id.* ("Isn't a child saving taxpayers' money by using one program rather than all of them?"). These home educators argue that they "are seeking less return from their taxpayer dollars." *Id.* Yet, even the home-school movement is divided over this issue. *See* Cloud, *supra* note 77, at 132. Many home-school parents question "[w]hat's the point of being home schooled . . . if banging down the [school] door exposes you again to the culture—and the regulations—inside?" *Id.*

⁸¹ McCarthy, *supra* note 76 (statement of the Connecticut Civil Liberties Union). These opponents assert that "[i]f a family decides to educate its children at home, it has made its choice" and should not then have access to public school programs. *Id.*

⁸² *See* Barrier, *supra* note 39, at 801.

⁸³ Lukasik, *supra* note 8, at 1971 (recognizing that "public school officials possess both regulatory and discretionary authority to admit or deny a request" of parents for part-time attendance).

⁸⁴ Barrier, *supra* note 39, at 801.

⁸⁵ *Id.* at 803. Many state officials fight against a new cooperative relationship between home and public education "because of the administrative burdens of admitting a home-schooled child on a part-time basis." Lukasik, *supra* note 8, at 1955. *But see* McCarthy, *supra* note 76 (recognizing that although one of the school districts' greatest fears is an inundation of the public schools with home-schooled students desiring to participate in programs, "very few

children from participation in these educational activities.⁸⁶

However, despite having no legal obligation to do so, public schools in some jurisdictions *are* choosing to cooperate with home schools in order to serve the educational needs of the children involved.⁸⁷ For example, the state of Washington, by statute, allows students to enroll in advanced and specialized classes at their local public schools in order to assist parents who feel ill-equipped to teach certain subjects.⁸⁸ Those Washington school districts that permit home-educated students to sign up part-time receive partial state funding.⁸⁹ Other jurisdictions allow home-educated students to participate in public school programs on a case-by-case basis.⁹⁰ As one commentator asserts, public schools *should* be more willing to work cooperatively with home schools, allowing the case-by-case inclusion of home-educated students, in light of the rights of children and the growing home-education trend.⁹¹

Regardless of the outcome of this debate over partial entrance and acceptance of home-educated students into the public school system, the federal IDEA structure presents a different situation. As described in the next section, the provision of IDEA services results from federal funding obligations, an issue of supplying *necessary* special education services and not mere "extracurricular activities" or public school "programs."⁹²

kids are taking advantage" of the opportunity).

⁸⁶ Barrier, *supra* note 39, at 803.

⁸⁷ Lukasik, *supra* note 8, at 1973 (stating that "public and home schools have begun a slow movement toward cooperation in recognition of the desire of both parties to maximize educational opportunities for children"). Thirteen states thus far have enacted statutes allowing for "some type of public school access to students who are educated primarily at home." Barrier, *supra* note 39, at 802.

⁸⁸ See Cafazzo, *supra* note 61 (noting that home-schooled students "can sign up at their local public schools for advanced math or other classes their parents feel ill-equipped to teach"). Additionally, "some home-school students study exclusively at home but participate in sports or music at their local public school." *Id.*

⁸⁹ *Id.*

⁹⁰ See, e.g., McCarthy, *supra* note 76 (noting that because no state law in Connecticut governs whether home-schooled students can participate in public school activities, "the decision is left to local administrators" to decide on a case-by-case basis).

⁹¹ Lukasik, *supra* note 8, at 1976-77 (arguing that it is "not in the best interest of the schools or the children to deny all requests for part-time admission" by students). "[T]he ideal educational result may be reached if public school officials consider each application, on a case-by-case basis, and admit only those home-schooled students seeking a genuine educational opportunity in the public schools who can enter public classes without disadvantaging full-time public school students." *Id.*

⁹² Of course, one would initially expect that public schools that are willing to welcome home-educated students' membership in the classroom or on a school team part-time would certainly desire to provide the more vital services of special education. Yet, as recognized *infra* Part VI.B, because the provision of these IDEA services can be much more costly than extracurricular activities, schools are even less apt to willingly expend the additional finances.

IV. THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

Legislation providing for special education for children with disabilities arose following the civil rights movement of the 1960s.⁹³ Congress initially dealt with the minority class of disabled children through several amendments to the Elementary and Secondary Education Act, but eventually passed separate legislation that specifically targeted the education of disabled children through federal grant assistance.⁹⁴ Congress has changed this legislation, now known as the Individuals with Disabilities Education Act, numerous times through the years.⁹⁵ This section explores the development of the IDEA, focusing on the congressional purposes behind the statute and the most important changes—for the direction of this note—the 1997 Amendments.⁹⁶ Understanding the 1997 Amendments' impact on private education presents a critical foundation for understanding the implications of including home schools within those considered as “private schools” under the statute.

A. Background

A practice of exclusion and overall disregard for the individual needs of disabled children dominates the history of special education in America.⁹⁷ The federal initiative, in what can be labeled the “equal educational opportunity movement,” did not materialize until the 1960s, following the general civil rights movement and “a long battle by advocates of the disabled to gain equal rights.”⁹⁸

⁹³ See *infra* notes 97–98 and accompanying text.

⁹⁴ See *infra* notes 99–108 and accompanying text.

⁹⁵ See *infra* notes 117–18 and accompanying text.

⁹⁶ See *infra* Part IV.B.

⁹⁷ See OSBORNE, *supra* note 9, at 3. Disabled children found themselves excluded from equal educational opportunity in two ways: (1) they were either literally excluded when denied access to public schools and attendant services or (2) they were effectually excluded when provided with inadequate services and untrained teachers. *Id.* at 1–3; see also 20 U.S.C. § 1400(c)(2)(C) (1994 & Supp. IV 1998) (stating that one million children with disabilities in the United States “were excluded entirely from the public school system and did not go through the educational process with their peers”).

⁹⁸ OSBORNE, *supra* note 9, at 3. In fact, students with disabilities became identified as “the other minority.” *Id.* at 5. The Supreme Court’s discussion in *Brown v. Board of Education*, 347 U.S. 483 (1954), paved the way for much of the argument by advocates for the education of the disabled:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has

Congress first addressed the issue of educating the disabled in 1966—creating the genesis of the current version of the IDEA.⁹⁹ This initial effort came as an amendment to the Elementary and Secondary Education Act of 1965 and established a grant program “for the purpose of assisting the States in the initiation, expansion, and improvement of programs and projects . . . for the education of handicapped children.”¹⁰⁰ Then in 1970, Congress passed the Education of the Handicapped Act (EHA)¹⁰¹ to further encourage, through state grants, programs that educated and trained the handicapped.¹⁰² Because Congress did not mandate these educational services within the EHA, however, it therefore created a rather weak provision.¹⁰³

Through the 1974 amendments to the EHA, Congress finally began to give teeth to its federal disabilities legislation.¹⁰⁴ Congress significantly increased the overall federal funding.¹⁰⁵ Also, for the first time it made the states’ receipt of funds contingent upon their adoption of “a goal of providing full educational opportunities to all handicapped children,” as well as a detailed timetable and a description of resources necessary to accomplish such a goal.¹⁰⁶ These amendments served as a precursor to the major legislative change in 1975¹⁰⁷—the enactment of the Education for All Handicapped Children Act (EAHCA).¹⁰⁸

undertaken to provide it, is a right which must be made available to all on equal terms.

Id. at 493 (emphases added).

⁹⁹ See *Bd. of Educ. v. Rowley*, 458 U.S. 176, 179 (1982).

¹⁰⁰ Elementary and Secondary Education Amendments of 1966, Pub. L. No. 89-750, § 161, 80 Stat. 1191, 1204; see also *Rowley*, 458 U.S. at 179–80.

¹⁰¹ Education of the Handicapped Act, Pub. L. No. 91-230, 84 Stat. 175 [hereinafter EHA]. The EHA also originated as an amendment to the Elementary and Secondary Education Act. See Andry, *supra* note 9, at 316.

¹⁰² Congress provided for state grants through “Part B” of the Act, a majority of which has been transferred into the current IDEA framework. See H.R. REP. NO. 105-95, at 83 (1997), *reprinted in* 1997 U.S.C.C.A.N. 78, 80. I refer to the House Report throughout this note, rather than the Senate Report because Congress passed the House version of the bill in lieu of the Senate bill. *Id.* at 78.

¹⁰³ See Andry, *supra* note 9, at 316. Moreover, because the 1966 and 1970 amendments “aimed primarily at stimulating the States to develop educational resources and to train personnel for educating the handicapped,” neither focused on providing actual guidelines or requirements for the states’ use of the grant money. See *Rowley*, 458 U.S. at 180.

¹⁰⁴ See Barrier, *supra* note 39, at 787.

¹⁰⁵ See *Rowley*, 458 U.S. at 180 (“Dissatisfied with the progress being made under [the] earlier enactments, and spurred by two District Court decisions holding that handicapped children should be given access to a public education, Congress in 1974 greatly increased federal funding for the education of the handicapped . . .”).

¹⁰⁶ Education Amendments of 1974, Pub. L. No. 93-380, 88 Stat. 484, 583 (emphasis added).

¹⁰⁷ See *Rowley*, 458 U.S. at 180 (recognizing that the 1974 statute served only as an interim measure “adopted ‘in order to give the Congress an additional year in which to study what[,] if any[,] additional Federal assistance [was] required to enable the States to meet the needs of handicapped children’”) (quoting H.R. REP. NO. 94-332, at 2 (1975)).

¹⁰⁸ Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C. §§ 1400–1487 (1994 & Supp. IV 1998)).

The EAHCA amended the earlier enactments primarily by refining and expanding the requirements for state participation in the grant program.¹⁰⁹ Congress included sections within the act that specifically enumerated findings and purposes.¹¹⁰ The findings articulated the extensive need for special educational services for children with disabilities,¹¹¹ including the identification of disabilities¹¹² and the provision of adequate services to children apart from expensive private assistance,¹¹³ in order to provide full equality of educational opportunity.¹¹⁴ Congress emphasized that the states carry the obligation of educating children with disabilities.¹¹⁵ Therefore, if the states accept federal assistance, they *must provide* a “free appropriate public education” to *all* children with disabilities.¹¹⁶

B. The 1997 Amendments and Their Impact on Private School Children

After the initial enactment of the IDEA in 1975, Congress made a series of amendments beginning in 1979.¹¹⁷ However, the most significant changes to the Act came in 1997 as the result of several years of investigation and drafting.¹¹⁸

¹⁰⁹ See H.R. REP. NO. 105-95, at 83 (1997), *reprinted in* 1997 U.S.C.C.A.N. 78, 80.

¹¹⁰ See 20 U.S.C. § 1400(c)(2) (findings); 20 U.S.C. § 1400(d) (purposes).

¹¹¹ See 20 U.S.C. § 1400(c)(2)(A) (stating that “the special educational needs of children with disabilities were not being fully met”).

¹¹² 20 U.S.C. § 1400(c)(2)(D) (stating that “there were many children with disabilities throughout the United States participating in regular school programs whose disabilities prevented such children from having a successful educational experience because their disabilities were undetected”).

¹¹³ 20 U.S.C. § 1400(c)(2)(E) (“[B]ecause of the lack of adequate services within the public school system, families were often forced to find services outside the public school system, often at great distance from their residence and at their own expense.”).

¹¹⁴ 20 U.S.C. § 1400(c)(2)(B) (1994 & Supp. IV 1998) (stating that “more than one-half of the children with disabilities in the United States did not receive appropriate educational services that would enable such children to have full equality of opportunity”).

¹¹⁵ 20 U.S.C. § 1400(c)(6) (noting that “States, local educational agencies, and educational service agencies are responsible for providing an education for all children with disabilities”).

¹¹⁶ See H.R. REP. NO. 105-95, at 83 (1997), *reprinted in* 1997 U.S.C.C.A.N. 78, 80; *see also* 20 U.S.C. § 1400(c)(6) (noting that as long as the states supply a proper education for those children with disabilities, “it is in the *national interest* that the Federal Government have a role in *assisting* State and local efforts to educate children with disabilities in order to improve results for such children and to ensure equal protection of the law”) (emphases added).

¹¹⁷ See H.R. REP. NO. 105-95, at 83 (1997), *reprinted in* 1997 U.S.C.C.A.N. 78, 80 (listing the numerous amendments made to the Act). For example, in 1986, Congress enacted the Handicapped Children’s Protection Act, Pub. L. No. 99-372, that provided for the award of attorney’s fees. *See id.* In 1990, Congress officially changed the Act’s name from the Education for All Handicapped Children Act, Pub. L. No. 94-142, to the Individuals with Disabilities Education Act via Pub. L. No. 102-119. *See id.* Then in 1994, pursuant to the Improving America’s Schools Act, Pub. L. No. 103-382, Congress eliminated the separate Handicapped Program and merged it with Part B under the IDEA. *See id.*

¹¹⁸ This legislation resulted from “several [years’] work with input from individuals and organizations representing the disabled, the education community, and parents” in order to gather a complete perspective on the need to change the IDEA. 143 CONG. REC. H2537 (daily

Congress concluded that despite the notable progress made throughout the country in improving the educational opportunities of children with disabilities,¹¹⁹ too many children still had not experienced "the promise of the law."¹²⁰ Although many reasons existed for the amendments,¹²¹ ultimately Congress retained the primary purpose of the original statute: "improved teaching and learning experiences for children with disabilities . . . [that] result in productive and independent adult lives . . ."¹²² Congress further asserted that the need for

ed. May 13, 1997) (statement of Rep. McKeon, subcommittee chairperson). In fact, Congress passed these amendments almost unanimously—evidencing the overwhelming consensus that the bill had been adequately researched and prepared. See Adam Clymer, *Senate Passes Bill on Teaching the Disabled*, N.Y. TIMES, May 15, 1997, at B14 (reporting the 420-to-3 passage rate of the House and the 98-to-1 passage rate of the Senate).

¹¹⁹ See H.R. REP. NO. 105-95, at 84-85 (1997), reprinted in 1997 U.S.C.C.A.N. 78, 81-82. House Report 105-95, which was passed in lieu of the Senate bill, credited the IDEA with: (1) causing an almost 90% decline in the number of disabled children living in state institutional facilities; (2) tripling the number of disabled children enrolled in post-secondary education; and (3) cutting in half the unemployment rate for disabled young adults (as compared with their older counterparts). *Id.*

¹²⁰ *Id.* (referring to the "promise" of the IDEA as supplying a free appropriate public education to all disabled children).

¹²¹ Congress found that the implementation of the Act had been "impeded by low expectations." 20 U.S.C. § 1400(c)(4) (1994 & Supp. IV 1998). According to House Report 95, the amendments were meant to: (1) strengthen the role of parents; (2) ensure access to general educational curricula; (3) focus on teaching and learning, rather than paperwork; (4) assist educational agencies in addressing the costs of improvement; (5) give more attention to diversity to prevent inappropriate identification; (6) ensure safe schools and learning environments; and (7) encourage parents and educators to use nonadversarial means to settle disputes. H.R. REP. NO. 105-95, at 85 (1997), reprinted in 1997 U.S.C.C.A.N. 78, 82.

Additionally, one of the listed purposes of the amendments was to "create incentives to enhance the capacity of schools and other community-based entities" through targeted funding for personnel training, research, technology, and technical assistance. *Id.* at 79; see also 20 U.S.C. § 1400(c)(5) (stating practices, supported by twenty years of research and experience, that make the education of children with disabilities more effective). It is worth noting that these stated goals are phrased in terms that tend to point towards the traditional school environment—not home education—although the overall purposes of the Act are stated in more general terms that can easily apply to home-educated students. See *infra* note 122 and accompanying text.

¹²² H.R. REP. NO. 105-95, at 85 (1997), reprinted in 1997 U.S.C.C.A.N. 78, 82. As one United States Representative explained, "this legislation is about empowering parents and students to be able to get the best education they can so that . . . they will have a chance to participate fully in American society." 143 CONG. REC. H2537 (daily ed. May 13, 1997) (statement of Rep. Miller). Within its statement of purpose, Congress also reemphasized that the IDEA attempts to "preserve the right of children with disabilities to a free appropriate public education" and to "promote improved educational results for children with disabilities . . . that prepare them for later educational challenges and employment." H.R. REP. NO. 105-95, at 82 (1997), reprinted in 1997 U.S.C.C.A.N. 78, 79; see also 20 U.S.C. § 1400(c)(1) (stating that providing these educational services "is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities"). No part of the statute presents a more straightforward encapsulation of Congress's prime motivation in passing the IDEA than 20 U.S.C. § 1400(d):

(d) Purposes. The purposes of this chapter are—

changes in the IDEA resulted from a desire to *ensure* the provision of a *quality* public education to disabled students and further improve these students' overall performance.¹²³

With the numerous changes made to the IDEA, Congress significantly affected the application of the Act to private education.¹²⁴ The amendments particularly imposed limitations on the education of those students who are placed unilaterally¹²⁵ in private schools by their parents.¹²⁶ Congress wanted to increase

(1)(A) to ensure that *all children with disabilities* have available to them a free appropriate public education that emphasizes special education and related services *designed to meet their unique needs and prepare them for employment and independent living*;

(1)(B) to ensure that the rights of *children* with disabilities and *parents* of such children are protected; and

(1)(C) *to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities*;

(2) to assist States in the implementation of a statewide, comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families;

(3) to ensure that *educators and parents have the necessary tools to improve educational results* for children with disabilities by supporting systemic-change activities; coordinated research and personnel preparation; coordinated technical assistance, dissemination, and support; and technology development and media services; and

(4) to assess, and ensure the effectiveness of, efforts to educate children with disabilities.

20 U.S.C. § 1400(d) (emphases added).

¹²³ H.R. REP. NO. 105-95, at 83–84 (1997), *reprinted in* 1997 U.S.C.C.A.N. 78, 80–81 (noting the “greater emphasis on improving student performance and ensuring that children with disabilities receive a quality public education”). In fact, the IDEA now contains several new provisions that attempt to guarantee results, including those that require the State “to establish performance goals for children with disabilities and to develop indicators to judge such children’s progress” and to establish regular student assessments. *Id.* at 91–92.

These amendments represent a critical shift in focus—emphasizing results and not just opportunities. *See* Barrier, *supra* note 39, at 789. Prior to the amendments, the IDEA simply secured disabled students access to special instruction and related services but did not necessarily guarantee any particular level of educational advancement. *Id.* at 788. *Compare* Bd. of Educ. v. Rowley, 458 U.S. 176, 176 (1982) with 20 U.S.C. § 1412 (1994 & Supp. IV 1998) (illustrating the difference in focus).

¹²⁴ *See* H.R. REP. NO. 105-95, at 92–93 (1997), *reprinted in* 1997 U.S.C.C.A.N. 78, 90 (listing the limitations placed on private school students by the amendments). If the IDEA is to be interpreted as the Hooks desired, then home-schooled children will face the same limitations under the amended IDEA statute as private school children currently do. *See infra* notes 130–46 and accompanying text (discussing the limitations on private school children); *see also infra* Part V.C (analogizing the private school limitations to home-educated students).

¹²⁵ “Unilateral placement” includes those students placed voluntarily in private schools without the initiative or approval of the local educational agency.

¹²⁶ *See* Jennifer A. Knox, Comment, *The IDEA Amendments of 1997 and the Private*

IDEA's cost-effectiveness by "clarify[ing] the responsibility of public school districts" to these unilaterally placed students.¹²⁷ These changes resulted as a response to the ever-growing bill for private school tuition¹²⁸ and the increased litigation being initiated by parents who felt entitled to IDEA funds.¹²⁹

The House Report emphasized three main implications of the amendments for private school students.¹³⁰ First, the amendments limit the total amount of money available to all private school students within a state to a proportional amount of the federal funds allocated to the state under Part B of the Act.¹³¹ Each state must use this proportional amount, based on "the number and location of children with disabilities in the State who are enrolled by their parents in private . . . schools," to provide special education and related services.¹³² However, the state and local educational agencies are *not* required to offer additional funding from their own budgets for the cost of education, including special education or related services.¹³³ The state and local educational agencies

Schools Provision: Seeking Improved Special Education, but Serving Only a Select Few, 49 CATH. U. L. REV. 201, 211 (1999) (noting that the amended IDEA "restricts its [free appropriate public education] requirement when considering voluntarily enrolled private school students").

¹²⁷ H.R. REP. NO. 105-95, at 92 (1997), *reprinted in* 1997 U.S.C.C.A.N. 78, 90.

¹²⁸ See 143 CONG. REC. H2536 (daily ed. May 13, 1997) (statement of Rep. Castle) (arguing that the IDEA "has had unintended and costly consequences," including the imposition of unnecessary and expensive private school educational costs on local school districts).

¹²⁹ See Barrier, *supra* note 39, at 789. Notably, one way in which Congress could further lower litigation costs borne by local school districts is by adding a home school provision explicitly into the IDEA statute, thus eliminating the on-going debate regarding home-schooled children's entitlement to these funds. See OSBORNE, *supra* note 9, at 200 ("[I]t is less costly to provide the needed [special education] services from the outset than it is to reimburse parents for obtaining those services privately along with their legal expenses . . ."); see also *infra* Part VI.A (arguing for the inclusion of an explicit home school provision within the IDEA).

¹³⁰ See H.R. REP. NO. 105-95, at 92-93 (1997), *reprinted in* 1997 U.S.C.C.A.N. 78, 90. Additionally, the House Report noted that the amendments continue to apply the child-find, identification, and evaluation provisions of the Act to voluntarily enrolled private school children. *Id.*; see also 20 U.S.C. § 1412(a)(10)(A)(ii) (1994 & Supp. IV 1998); *infra* notes 195-97 and accompanying text (discussing the application of these provisions to home-educated students if they were under the statute).

¹³¹ See 20 U.S.C. § 1412(a)(10)(A)(i) ("Amounts expended for the provision of those services by a local educational agency shall be equal to a proportionate amount of Federal funds made available under this subchapter.").

¹³² *Id.* In order to determine the amount of federal funding to be spent on private school children, each local educational agency must annually consult with private school representatives to attain the estimated number of eligible students with disabilities for the subsequent year. See 34 C.F.R. § 300.453(b) (2000). Thus, Congress retained a child-count feature for determining private school students' entitlement to federal funds while at the same time eliminating the child-count formula generally. See *infra* note 232 and accompanying text (describing the general change in the funding formula).

¹³³ Local educational agencies have no obligation to utilize local and state funding for the special education of private school students. See Knox, *supra* note 126, at 213; see also 34 C.F.R. § 300.453(d) (2000) ("State and local educational agencies are *not prohibited* from

also have complete discretion in deciding how specifically to allocate the federal funds earmarked for private school students.¹³⁴ Thus, ultimately, an individual private school child may receive little benefit from the limited funding because another qualified private school child may consume the pot's resources beforehand.¹³⁵

Second, the amendments state that school districts *may* provide the special education services on private or even parochial school premises, to the extent consistent with the law.¹³⁶ Several Supreme Court cases established that providing such services on the premises of parochial schools does not violate the Establishment Clause.¹³⁷ Yet, arguably, because local educational agencies have

providing services to private school children with disabilities in excess of those required by this part . . .") (emphasis added). This permissive language certainly does not give the local agencies any incentive to expend additional amounts of money; indeed, it is doubtful that they would choose to do so. *See* Knox, *supra* note 126, at 227; *see also* Lauri M. Traub, Comment, *The Individuals with Disabilities Education Act: A Free Appropriate Public Education—At What Cost?*, 22 HAMLIN L. REV. 663, 686 (1999) (asserting that school districts have no incentive "to provide special education services to unilaterally placed children[;] [i]n fact, as the amendments now stand, it is more beneficial for the public school district if the parents . . . choose to place [their disabled children] in private educational settings . . . [because these] children cost the school district nothing").

¹³⁴ When deciding how to apportion the federal allotment, the local school districts must consider several factors: (1) the total funding available; (2) the number of private school children with disabilities; (3) the needs of these private school children; and (4) the location of the children. *See* 34 C.F.R. § 300.454(b)(1) (2000). These considerations are then used to determine (1) which children will receive services; (2) what services will be provided; (3) how and where the services will be provided; and (4) how these services will be evaluated. *Id.*

Additionally, these discretionary decisions may further "threaten prompt disbursement of funding to disabled children" because the state and/or school district must first determine the proportional amount of federal funds to which any one private school or child is entitled. *See* Barrier, *supra* note 39, at 793. This overall calculation may prove "complicated enough to delay getting the necessary funding to the needy child, . . . [thus giving] rise to a new and uncharted arena for litigation." *Id.*

¹³⁵ *See* 34 C.F.R. § 300.454 (2000). Therefore, "[n]o private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school." 34 C.F.R. § 300.454(a); *see also* 34 C.F.R. § 300.455(a)(2) ("Private school children with disabilities may receive a different amount of services than children with disabilities in public schools."). *But see* 34 C.F.R. § 76.651 (a)(1) (2000) (noting that each state and/or local school district "shall provide students enrolled in private schools with a genuine opportunity for equitable participation").

¹³⁶ *See* 20 U.S.C. § 1412(a)(10)(A)(i)(II) (1994 & Supp. IV 1998) ("Such services may be provided to children with disabilities on the premises of private, including parochial, elementary and secondary schools . . ."); *see also* 34 C.F.R. § 300.456(a) (to the same effect).

¹³⁷ *See, e.g.,* Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993) (holding that providing the services of a sign-language interpreter on parochial school grounds pursuant to the IDEA did not violate the establishment clause); *see also* Agostini v. Felton, 521 U.S. 203, 231 (1997) (sustaining the general allocation of public funding to parochial schools when the aid is "allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis"). In spite of the Supreme Court's assurance, the administrative regulations for the IDEA take special care to emphasize the financial restraints of the federal funding. *See* 34 C.F.R. § 300.459

discretion to decide *where* to provide the special education and related services,¹³⁸ private school students may nonetheless be deprived of the services necessary for an *appropriate* educational opportunity.¹³⁹ Therefore, if the services do not have to be provided on-site and yet prove necessary for the child's learning, parents may in the end feel forced to send their child to public school when the child is logistically (versus legally) denied access at the private school.¹⁴⁰

Finally, the amendments stressed that local educational agencies must only reimburse parents for the cost of private placement (including tuition, special education, and related services) under certain circumstances.¹⁴¹ In general, parents qualify for reimbursement only if they enroll their child in a private school after the local educational agency fails to make a free appropriate public education available to the child in a timely manner prior to the private school enrollment.¹⁴²

(stating that the funds provided are limited to special education needs and may not be used "to finance the existing level of instruction in a private school or to otherwise benefit the private school").

¹³⁸ See *supra* note 134 and accompanying text (describing the local educational agencies' discretionary considerations).

¹³⁹ See Knox, *supra* note 126, at 226 (contending that the restrictions created by the amendments "will likely have a negative impact on the appropriateness of education provided to voluntarily enrolled disabled students, as well as potentially life-long effects on the learning capabilities of these students"). Many disabled students depend upon their related services, such as sign language interpreters or instructional aids, in order to learn *within* the classroom. *Id.*

¹⁴⁰ Such a discretionary provision may thus render the holding in *Zobrest* insignificant. See William L. Dowling, Comment, *Special Education and the Private School Student: The Mistake of the IDEA Amendments Act*, 81 MARQ. L. REV. 79, 88 (1995) (arguing that the amendments perpetuate a key oversight in the legislation, thus minimizing the significance of *Zobrest* because they do not "require school boards to provide special education and related services on-site at private schools in at least some situations"). Dowling asserts that in Congress's attempt to create uniformity and clarification among the courts in regard to private school decisions under the IDEA, it unduly hurt many of the children it intended to help by enacting the amendments. *Id.* at 96. He recommends that Congress at least require school boards to provide on-site special education and related services to private school children on a case-by-case basis. *Id.* at 97-101 (describing a five-step analysis, including the significant considerations of (1) whether the cost of the service differs if provided on-site versus a neutral, public location and (2) the nature of the services offered in relation to the individual child's needs, i.e. whether the benefit of the service can be realized only if received during class).

Cf. Knox, *supra* note 126, at 241 (reasoning that courts should not "brush aside the federal funding obligation and interpret the Amendments strictly," but should instead "go one step further and grant services through a collective entitlement, and then, on a case by case approach, analyze the level of intensity of each particular service, as well as the cost to provide that service"). Parents choosing to "opt out" of public school education for their child, as is their right, "should not arbitrarily be denied related services." *Id.* at 230. Parents choose private education for their children for various reasons, including religion or a desire for a smaller setting with individualized attention, but the amendments limit this parental choice by allowing for the discretionary denial of on-site services. *Id.* at 229-30.

¹⁴¹ See 20 U.S.C. § 1412(a)(10)(C) (1994 & Supp. IV 1998) (defining the limited scope of reimbursement).

¹⁴² 20 U.S.C. § 1412(a)(10)(C)(ii). Therefore, independent reasons for choosing private education do not matter. See discussion *supra* note 140. Plus, this reimbursement is granted

Yet, the Act allows for the further reduction, or even denial, of this reimbursement if: (1) the parents fail to properly notify the public school of their concerns and intention; (2) the parents refuse to make the child available for evaluation by the public agency; or (3) the parents' actions are judicially found unreasonable.¹⁴³ Thus, those parents who choose private placement because they legitimately disagree with the IEP—that is, they believe that the educational services provided their child are inappropriate—now must make a difficult choice between temporarily accepting the current placement or automatically selecting private placement.¹⁴⁴ Parents who opt to accept the child's current placement, while waiting for a procedural hearing to determine the appropriateness of the plan, potentially risk their child's education.¹⁴⁵ Those who opt to place their child in a private school before the hearing, however, potentially risk financial responsibility if a court later determines that the plan was appropriate and the parents cannot obtain reimbursement.¹⁴⁶

V. STATUTORY ANALYSIS: HOME SCHOOLS TREATED AS PRIVATE SCHOOLS?

The Hooks family argued that their home-schooled son, Christopher, qualified for special education services as a "private school" student under the IDEA.¹⁴⁷ This Part first analyzes the statutory framework surrounding this issue,¹⁴⁸ affirming the Ninth Circuit's finding that home schools are not included as private schools under the federal statute and that home-educated students currently receive IDEA funds only if the applicable state law allows it.¹⁴⁹ This Part then argues that home-educated students *should* be analogized to private school students and concludes by describing the implications of such an analogy.

only if a court or hearing officer decides it is appropriate. See 20 U.S.C. § 1412(a)(10)(C)(ii).

¹⁴³ 20 U.S.C. § 1412(a)(10)(C)(iii). But see 20 U.S.C. § 1412(a)(10)(C)(iv) (listing exceptions to the notice requirement).

¹⁴⁴ See Andry, *supra* note 9, at 324.

¹⁴⁵ See 20 U.S.C. § 1415(b)(6) (1994 & Supp. IV 1998) (providing an opportunity for parents "to present complaints with respect to any matter relating to . . . educational placement of the child, or the provision of a free appropriate public education to such child"). Section 1415 also describes the procedural hurdles that parents must pass to protest the appropriateness of their child's education.

¹⁴⁶ See Andry, *supra* note 9, at 324–25 (noting that "conscientious parents who have adequate means and who are reasonably confident of their assessment normally would" pay for "what they consider to be . . . appropriate placement") (quoting *Burlington Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359, 370 (1985)); see also Barrier, *supra* note 39, at 793 (describing the "inherent conflict between what parents subjectively believe is educationally best for their child, and the local school district's goals of flexibility and cost cutting in providing education").

¹⁴⁷ See *supra* Part II (describing the Ninth Circuit case, *Hooks v. Clark County School District*, 228 F.3d 1036 (9th Cir. 2000)).

¹⁴⁸ This note will utilize several doctrines of statutory interpretation but by no means attempts to perform a full-fledged analysis of the IDEA.

¹⁴⁹ See *Hooks*, 228 F.3d at 1037.

*A. Not Within the Current Federal Statute*¹⁵⁰

The first step in any statutory interpretation is an analysis of the plain language.¹⁵¹ The text of the statute does not mention home-educated or home-schooled children at all. Instead, the statute only frames issues around “public school” and “private school” children.¹⁵² Home-schooled children most certainly are not public school children, so the only question is whether they fit within the definition of private school children. The internal statutory definitions indicate a negative answer to this question.¹⁵³ Even though there is no statutory definition for “private school,” the definitions of both “elementary school” and “secondary school” indicate an “institutional day or residential school that provides . . . education, as determined under State law.”¹⁵⁴ The term “school” certainly conjures up pictures of a school building with numerous teachers and students.¹⁵⁵ The term “institutional” in ordinary usage certainly connotes a larger organizational entity than the usual one family home school.¹⁵⁶ The Ninth Circuit focused on the phrase “as determined by State law” in holding that Congress specifically deferred to state law to decide what constitutes a private elementary or secondary school.¹⁵⁷ However, it is certainly arguable that the limiting phrase, “as determined under State law”—within the definition of both “elementary school” and “secondary school”—is being used to modify “elementary education” and “secondary education” respectively, not elementary or secondary

¹⁵⁰ Ironically enough, I began researching this note in order to argue that the Ninth Circuit reached the wrong outcome about the IDEA’s application, attempting to prove that the general purposes of the IDEA should encompass the inclusion of home-educated students. However, as the following discussion reveals, Congress did not provide for home-educated students within the statutory boundaries, although they should have done so.

¹⁵¹ Although courts have given the text varying degrees of weight within statutory analysis, depending on their theory of interpretation (e.g., textualism, intentionalism, and purposivism), the plain language remains the starting point. *See generally* ESKRIDGE & FRICKEY, *supra* note 34, at ch. 7 (discussing various theories of statutory interpretation).

¹⁵² Private school children are further subdivided into those that are enrolled in the private school by a public agency and those that are enrolled by their parents. 20 U.S.C. § 1412(a)(10) (1994 & Supp. IV 1998).

¹⁵³ These definitions are provided in 20 U.S.C. § 1401 (1994 & Supp. IV 1998).

¹⁵⁴ “Elementary school” is defined as “a nonprofit institutional day or residential school that provides elementary education, as determined under State law.” 20 U.S.C. § 1401(5). “Secondary school” is defined as “a nonprofit institutional day or residential school that provides secondary education, as determined under State law, except that it does not include any education beyond grade [twelve].” 20 U.S.C. § 1401(23).

¹⁵⁵ The first dictionary definition of “school” states that it is “an organization that provides instruction,” including “an institution for the teaching of children.” MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 1045 (10th ed. 1993).

¹⁵⁶ The dictionary defines an “institution” as “a significant practice, relationship, or organization in society or culture,” and alternatively as “an established organization or corporation . . .” *Id.* at 606.

¹⁵⁷ *Hooks v. Clark County Sch. Dist.*, 228 F.3d 1036, 1040 (9th Cir. 2000) (holding that Nevada’s definition of a private “institution” excluded an exempted private home).

"school."¹⁵⁸ This makes a difference in deciding the scope of Congress' explicit deference to state law—deference to determine what constitutes an acceptable *level of education* or deference to determine what constitutes an acceptable *place for education*.¹⁵⁹

Additionally, although home-educated students are not explicitly mentioned in the language of the statute, they are likewise not explicitly excluded.¹⁶⁰ In fact, section 1412 includes a list of limitations upon the age of the children to whom a state must make a free appropriate public education available.¹⁶¹ The state generally must provide a free appropriate public education to *all* children with disabilities between the ages of three and twenty-one, except the state may exclude, under certain circumstances, students who are aged three through five¹⁶² and others aged eighteen through twenty-one.¹⁶³

Yet other language within the same section reveals an intention to apply "private school" as the ordinary meaning connotes. For example, the IDEA provides for students who have been "suspended or expelled."¹⁶⁴ The notion of being temporarily excluded or forced to leave connotes being away from home in the first place. Also, the IDEA emphasizes the "least restrictive environment" concept of educating disabled and non-disabled children together, whenever possible, in the "regular educational environment" or "regular class."¹⁶⁵

¹⁵⁸ The limiting phrase is placed adjacent to the terms "elementary education" and "secondary education." See 20 U.S.C. § 1401(5) and (23) (1994 & Supp. IV 1998).

¹⁵⁹ The definitions within the promulgated regulations present roughly the same wording. See 34 C.F.R. § 77.1(c) (2000). However, in the regulatory language, "secondary school" differs in a significant way that tends to show that the phrase "as determined under State law" does refer to the education itself and not to the place of education. *Id.* ("In the absence of State law, the Secretary may determine, with respect to that State, whether the term [secondary education] includes education beyond the twelfth grade.").

¹⁶⁰ Therefore, according to the canon of *expressio unius*, the enumeration of certain student exceptions in the statute suggests that the legislators had no intent of excepting any other students not specifically listed. See ESKRIDGE & FRICKEY, *supra* note 34, at 824. "Expressio unius est exclusio alterius" translated means "inclusion of one thing indicates exclusion of the other." *Id.*

¹⁶¹ See 20 U.S.C. § 1412(1)(B) (1994 & Supp. IV 1998).

¹⁶² 20 U.S.C. § 1412(1)(B)(i) (allowing the exclusion of children aged three through five if such an inclusion would be "inconsistent with State law or practice, or the order of any court").

¹⁶³ 20 U.S.C. § 1412(1)(B)(ii) (allowing the exclusion of "children" aged eighteen through twenty-one "to the extent that State law does not require that special education and related services . . . be provided to children with disabilities who, in [their] educational placement prior to incarceration in an adult correctional facility," either were not identified as a disabled child or did not have an IEP prepared).

¹⁶⁴ 20 U.S.C. § 1412(1)(A) ("A free appropriate public education is available to all children with disabilities residing in the State . . . including children with disabilities who have been suspended or expelled from school."). In fact, a focus of the debate over the 1997 Amendments was the need to be able to discipline children with disabilities and the relative impact any disciplinary action might have on their receipt of special education services. See 143 CONG. REC. S4358–59 (daily ed. May 13, 1997) (statement of Sen. Jeffords).

¹⁶⁵ See 20 U.S.C. § 1412(5). These terms likewise connote the ordinary meaning of "school." The desire to integrate children with disabilities into the public schools and provide

The greatest indication of congressional intent for this statute comes from the legislative history,¹⁶⁶ and, most importantly, the history of the 1997 Amendments.¹⁶⁷ Legislators sought to attack several key issues, including the quality of education being provided children with disabilities,¹⁶⁸ the performance of these children,¹⁶⁹ and the rising costs of litigation and private school tuition.¹⁷⁰ The many stated goals throughout congressional reports and floor statements focused around *institutional* learning problems: personnel training, safety and discipline concerns, diversity issues, and technology (to name a few).¹⁷¹ Issues of cost-effectiveness in the area of private education became central to the changes affecting unilaterally placed private school students. At this point, one would expect home education to figure into the equation,¹⁷² yet nothing throughout the legislative history signals the consideration of home schooling as private

them with equal educational opportunity served as the initial impetus for disabilities education legislation. See *supra* notes 97–98 and accompanying text.

¹⁶⁶The Supreme Court splits over whether legislative history should be consulted to identify congressional intent (when such intent is ambiguous from the statutory text) before moving to the relevant agency's interpretation. For example, the majority in *Chevron U.S.A. v. Natural Resources Defense Council*, first examined legislative history in order to have a more complete view of congressional intent regarding the meaning of the text of a provision of the Clean Air Act. 467 U.S. 837 (1984). When this did not help, they then turned to the interpretive guidelines of the Environmental Protection Agency. *Id.* But see *Smiley v. Citibank*, 517 U.S. 735 (1996) (skipping directly to the Comptroller of the Currency's interpretation of "interest," without considering legislative history, after finding the word to be ambiguous as used in the National Bank Act). This potential difference in interpretive outcome, however, is not important here because the congressional intent evident in the legislative history of the IDEA and OSEP's interpretation reach the same result.

¹⁶⁷See *supra* Part IV.B (describing the monumental undertaking by Congress to strengthen the Act after several years of investigation and drafting). However, even the initial enactment of the IDEA showed Congress' intent to initiate the inclusion of children with disabilities into the general educational environment by providing adequate services and trained teachers. See 20 U.S.C. § 1400(c)(2) (1994 & Supp. IV 1998) (listing findings of the 1975 Act).

¹⁶⁸H.R. REP. NO. 105-95, at 84 (1997), reprinted in 1997 U.S.C.C.A.N. 78, 81 (indicating that the amendments were meant to improve the quality of education by strengthening the parental role in the student's education, focusing attention on actual teaching instead of paperwork, and locating students who were misidentified).

¹⁶⁹*Id.* (indicating that the amendments were meant to ensure safe schools and learning environments). The amendments emphasized improving student performance through performance goals, indicators, and assessment provisions. *Id.* at 91–92.

¹⁷⁰*Id.* at 79 (indicating that the amendments were meant to address cost issues by targeting money for the financial assistance of educational agencies with improvement initiatives such as personnel training, research, and technology). Congress intended to "clarify the responsibility of public school districts" for unilaterally placed private school students because the initial enactment had produced costly consequences for local school districts through the imposition of unnecessary and expensive private tuition bills. *Id.* at 90; see also 143 CONG. REC. H2536 (daily ed. May 13, 1997) (statement of Rep. Castle).

¹⁷¹See *supra* notes 168–70 and accompanying text.

¹⁷²For example, concerns about tuition costs would be alleviated to the extent that some of the "private school" students were actually being home-schooled and therefore not paying costly tuition fees.

education. This indicates an intent by Congress to deal with the traditionally accepted school setting.¹⁷³ Although this legislative intent appears to be clear—a consideration of “private school” only in line with ordinary parlance—one may still believe the interpretation is too ambiguous and therefore need to turn to agency guidance.¹⁷⁴

The Supreme Court has held that when an enforcing agency interpretation exists, the interpretation of that agency must carry great weight if the intent of Congress is not unambiguously apparent from the statute.¹⁷⁵ The Ninth Circuit relied upon a 1992 policy letter written by OSEP¹⁷⁶ in response to the following question: “Are children with disabilities who are being educated at home to be considered private school students for the purposes of determining whether to provide them with special education or related services?”¹⁷⁷ OSEP acknowledged that the IDEA and its regulations do not define the term “private school or facility” and declared that the answer to whether to consider a home school equivalent to a private school must be founded on the relevant state law.¹⁷⁸ OSEP

¹⁷³ There are usually several reasons why congressional intent may be unclear:

Perhaps that body [Congress] consciously desired the Administrator [agency] to strike the balance . . . [because] those with great expertise and charged with responsibility for administering the provision would be in a better position to do so; perhaps it [Congress] simply did not consider the question . . . and perhaps Congress was unable to forge a coalition on either side of the question

See *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 865 (1984). Because home schooling was not even mentioned in the legislative history, it appears that Congress’s intent is unclear because it simply did not consider the issue.

¹⁷⁴ Or, as stated *supra* note 166, if one does not believe in the efficacy of legislative history in statutory interpretation, then consulting the agency interpretation becomes even more important in this instance.

¹⁷⁵ *Chevron*, 467 U.S. at 844 (“We have long recognized that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer”); *Smiley v. Citibank*, 517 U.S. 735, 739 (1996) (“It is our practice to defer to the reasonable judgments of agencies with regard to the meaning of ambiguous terms in statutes that they are charged with administering.”). *Chevron* proposed a two-step process for determining when to defer to the agency’s interpretation. First, if Congress’s intent is clear from the statute, then the analysis stops. 467 U.S. at 842–43 (“If the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”). However, if Congress did not address the question specifically, then the court moves to the second step—adopting the agency’s interpretation as long as it is reasonable or “permissible.” *Id.* at 843 (“Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”).

¹⁷⁶ OSEP, the Office of Special Education Programs, is the principal agency for administering the IDEA. 20 U.S.C. § 1402 (1994 & Supp. IV 1998); *supra* note 21.

¹⁷⁷ Digest of inquiry made by Shelton O. Williams, Director, Division of Pupil Personnel Services, Montgomery County Public Schools, to Judy A. Schrag, Director, Office of Special Education Programs (Feb. 14, 1991), in 18 IDELR 742 (1992).

¹⁷⁸ Text of response by Judy A. Schrag, Director, Office of Special Education Programs, to Shelton O. Williams, Director, Division of Pupil Personnel Services, Montgomery County Public Schools (Jan. 22, 1992), in 18 IDELR 742 (1992) (“[T]he determination of whether a

reaffirmed this position of deference to state law in a 1997 policy letter.¹⁷⁹ Courts must comply with this reasonable agency interpretation in the absence of explicit direction from Congress.¹⁸⁰

B. The Need to Analogize Home-Schooled Students to Private School Students

In light of the above discussion, it appears that the IDEA statutory framework does not specifically deal with homeschoolers and accords deference to state law regarding the definition of a "private school or facility." But, the purposes undergirding the IDEA, plus the need for more uniformity in its application, dictate that Congress should integrate home-educated students into the Act by analogizing them to private school students.¹⁸¹

As noted earlier, the foundational purposes of the statute readily encompass the provision of IDEA funds to home-schooled children.¹⁸² Home-educated children with disabilities, just as private school children with disabilities, will grow into adult citizens. The same national interest in promoting productive, self-sufficient citizens equally applies to these home-educated children.¹⁸³ The same legislative desire to ensure the rights of and improve the educational experiences of all disabled children should also apply equally to home-educated children.¹⁸⁴

The Ninth Circuit accepted the IDEA's deference to the states as a legitimate attempt to preserve state sovereignty.¹⁸⁵ The court believed that the states'

particular home education arrangement constitutes the enrollment of a child with a disability in a private school or facility must be based on State law.") [hereinafter OSEP 1992 Policy Letter].

¹⁷⁹ Letter from Thomas Hehir, Director, Office of Special Education Programs, to Sarzynski (Nov. 27, 1997) in 29 IDELR 904 (1999) ("Consequently, OSEP has advised that the determination of whether a particular home education arrangement constitutes the enrollment of a child with a disability in a private school or facility must be based on State law.").

¹⁸⁰ Giving deference to state law in this area certainly can be considered reasonable because education is a main function of state—and not federal—law. See *supra* note 54 and accompanying text (describing the right of states to govern local education).

¹⁸¹ Additionally, it makes sense that if all states now offer home-educated students an equal opportunity, as private school students, for exemption from public school attendance, then home-educated students should have an equal opportunity to access federal assistance. See *supra* notes 67–73 and accompanying text (discussing the acceptance of home education as an alternative means of satisfying compulsory attendance statutes).

¹⁸² See *supra* Part IV.B (discussing the continued legislative purpose, in the face of the 1997 Amendments, of providing improved teaching and learning experiences for all children with disabilities, with the ultimate goal of nurturing productive and independent adults).

¹⁸³ See H.R. REP. NO. 105-95, at 84–85 (1997), reprinted in 1997 U.S.C.A.N. 78, 81–82 (emphasizing the importance of preparing children for later educational and employment challenges).

¹⁸⁴ See 20 U.S.C. § 1400(d) (1994 & Supp. IV 1998) (listing the motivating purposes behind the statute, including the desire to ensure "that all children with disabilities have available to them a . . . special education . . . designed to meet their unique needs" and "that the rights of children with disabilities and parents of such children are protected").

¹⁸⁵ *Hooks v. Clark County Sch. Dist.*, 228 F.3d 1036, 1043 (9th Cir. 2000) (noting that "education is an area 'where States have historically been sovereign'" (quoting *United States v.*

treatment of home schools differs sufficiently from their treatment of private schools to justify the refusal of any analogous relationship.¹⁸⁶ Although federalism concerns are important considerations, this legislation already defines many uniform issues of scope, including, for example, the exact range of qualifying disabilities that must be covered.¹⁸⁷ So why should it not go a little further and unify the states' application of the law to home-educated students?¹⁸⁸ Only a minority of states currently define "private school" so as to include home-educated students.¹⁸⁹ Without some kind of uniform change to the statutory framework, only home-schooled students in these limited states automatically qualify for the opportunity to receive federal assistance under the IDEA's private school provisions.¹⁹⁰

C. Implications of the Analogy

Many commentators have attacked the limitations put upon unilaterally placed private school students, calling for an overall expansion of the resources

Lopez, 514 U.S. 549, 564 (1995)).

¹⁸⁶ *Id.* at 1042 (arguing that home-educated students understandably can be treated differently than private school students under the IDEA because home schools "are not subject to the same educational and institutional controls that guide educators in institutional private schools"). Among other things, private schools in Nevada—unlike home schools—face expanded legal obligations, require a license, and must provide instruction in specific subject areas. *Id.* But see 20 U.S.C. § 1413(a)(5) (1994 & Supp. IV 1998) (providing for the express inclusion of charter schools within the IDEA framework even though—as described in 20 U.S.C. § 8061—charter schools routinely require less oversight and structure than normal public schools); Jodie Morse, *Do Charter Schools Pass the Test?*, TIME, June 4, 2001, at 60 (noting the "educational free-for-all" of charter schools and their "wildly varying quality"); *infra* Part V.C.1 (discussing possible oversight issue for home schools).

¹⁸⁷ See 20 U.S.C. § 1401(3) (1994 & Supp. IV 1998); 34 C.F.R. § 300.7 (2000).

¹⁸⁸ The Ninth Circuit recognized this "haphazard patchwork in which the provision of IDEA benefits varies from state to state," but it accepted the regulatory scheme as a congressional decision. *Hooks*, 228 F.3d at 1043. This may be the correct application of the statute, but why does this not pose an equal protection problem? Granted, persons living from one state to the next benefit differently from their particular state's resources (e.g., differing state tax systems, residency requirements, licensing regulations, police provisions). But why should some home-schooled children with disabilities qualify to receive a proportional amount of federal funding when other similarly disabled children are denied access to the federal funding initiative? See *infra* notes 219–21 and accompanying text (discussing the federal spending power).

¹⁸⁹ In twelve states, individual home schools may operate as private schools. KLICKA, *supra* note 7, at 161. An additional six states allow groups of home-schooled students to "qualify as private schools even though the instruction individually takes place in each home." See *id.* at n.8.

¹⁹⁰ In addition, as the IDEA private school provisions are currently written, local and state educational agencies have no requirement—and no incentive—to supplement the federal funding given to private school students. See *supra* note 133 and accompanying text. Therefore, the only additional impediment on state sovereignty is merely an obligation to identify children entitled to funds under the IDEA. See *infra* note 196 and accompanying text (describing the child-find responsibility of local educational agencies).

available to these disabled children.¹⁹¹ Whether Congress repeals its restrictions from the 1997 Amendments is yet to be seen, but regardless of this outcome, home-educated students should at least have an equal *opportunity* to receive a proportional amount of federal funds. Once home schools are accepted as an equivalent form of private education, at least for purposes of the IDEA, home-schooled children will be treated by the states in the same manner as current private school children.¹⁹² Therefore, the increased access to federal funds for home-schooled children with disabilities will be subject to state oversight provisions and limitations on services.

1. State Oversight Issues

When parents voluntarily seek federal funds and services for their home-educated child, they will necessarily place themselves under state control.¹⁹³ Home educators already must comply with various reasonable regulations in order to avoid compulsory attendance statutes.¹⁹⁴ Homeschoolers who choose to take advantage of the private school provisions in the IDEA will be required to carry additional burdens to ensure entitlement and compliance.

First, they will be subject to the child-find provisions of the Act that apply to voluntarily enrolled private school children.¹⁹⁵ Under the child-find provisions, each state has the responsibility of locating, identifying, and evaluating “[a]ll children with disabilities residing in the State.”¹⁹⁶ This will require home schooling parents—as the representatives of private school children—to consult with the local educational agency and devise a plan for fulfilling this evaluative process.¹⁹⁷ Second, once a local educational agency identifies a home-educated student as disabled within the IDEA and designates the child to receive services, the parents must submit to further evaluation of their child for the creation of a

¹⁹¹ See *infra* notes 229–35 and accompanying text.

¹⁹² See *supra* Part IV.B (discussing the general application of the IDEA to private school education following the 1997 Amendments). This note only focuses on the inclusion of home schools as private schools within the confines of the IDEA; it does not purport to deal with any additional implications (if any) of characterizing home education as private education under other federal or state laws (i.e., if other statutes exist that deal with private schools).

¹⁹³ KLIKA, *supra* note 7, at 148–50 (noting that these parents place themselves under federal jurisdiction and state control).

¹⁹⁴ See *supra* notes 68–72 (explaining the varying degrees of state regulation that have been upheld by courts, including notice and approval requirements, teacher qualifications, and student testing).

¹⁹⁵ 20 U.S.C. § 1412(a)(10)(A)(ii) (1994 & Supp. IV 1998) (“The requirements . . . of this subsection (relating to child-find) shall apply with respect to children with disabilities in the State who are enrolled in private, including parochial, elementary and secondary schools.”).

¹⁹⁶ 20 U.S.C. § 1412(3)(A); see also 34 C.F.R. § 300.451(a) (2000) (ensuring that “[t]he activities undertaken to carry out this responsibility for private school children with disabilities must be comparable to activities undertaken for children with disabilities in public schools”).

¹⁹⁷ 34 C.F.R. § 300.451(b) (“[e]ach [local educational agency] shall consult with appropriate representatives of private school children with disabilities on how to carry out the activities described” in the child-find section).

services plan.¹⁹⁸ This will require periodic meetings between the parents and the local educational agency to “develop, review, and revise a services plan for the child.”¹⁹⁹ Finally, due to the focus of the 1997 IDEA amendments upon improving student performance,²⁰⁰ home-educated students receiving IDEA funds will certainly face additional standardized assessment tests because the states are now accountable for setting performance goals and evaluating progress.²⁰¹

2. Limited Services

Of course, even when the local educational agency designates a home-schooled child to receive services, the child may still receive minimal funding, or no funding at all.²⁰² When equal to all institutional private school children, home-schooled children will not necessarily (and probably will not) receive the same level of special education and related services available to those students enrolled in public schools.²⁰³ Home-schooled children will be vying for the same proportional pot of federal funds allocated to the state for all private school

¹⁹⁸ 34 C.F.R. § 300.452(b) (“Each [state educational agency] shall ensure that . . . a services plan is developed and implemented for each private school child with a disability who has been designated to receive special education and related services . . .”); *cf. supra* note 19 (defining an IEP used for public school students).

¹⁹⁹ 34 C.F.R. § 300.454(c)(1); *see also* 34 C.F.R. § 300.455(b)(2) (“The services plan must, to the extent appropriate[,] . . . [b]e developed, reviewed, and revised . . .”).

²⁰⁰ *See supra* note 123 (describing this shift in focus from emphasizing opportunities to emphasizing results).

²⁰¹ *See* 20 U.S.C. § 1412(a)(16) & (17) (1994 & Supp. IV 1998). Such testing to measure performance will be even more likely under the Bush Administration because accountability lies at the center of its education reform plan. *See* Press Release, Remarks by the President and Mrs. Bush in Education Roundtable (Feb. 20, 2001), at <http://www.whitehouse.gov/news/releases/2001/02/text/20010220-3.html>. Bush stated: “One of the things that I’m insisting that the Congress enact is a law that says that if you receive federal money, you, the state or the local jurisdiction, must measure to show us whether or not children are learning. The heart of education reform is accountability.”

In fact, the No Child Left Behind Act may specifically exempt “all home schools and those private schools that do not use federal funds from all testing requirements” used for accountability. *See* Summary: The No Child Left Behind Act (H.R. 1) As Passed by the House (May 23, 2001), at http://www.house.gov/ed_workforce/issues/107th/education/nclb/sumhr1.pdf (summarizing the House version of the bill that is being considered in conference). One can infer from this that all home-schooled children seeking federal funding *would*, therefore, be subject to additional testing requirements.

²⁰² *See* OSEP 1992 Policy Letter, *supra* note 178 (providing that the states have “discretion to devise, in consultation with private school representatives, the most efficient scheme possible for providing adequate special education and related services to a number of, but not necessarily all, private school” children with disabilities).

²⁰³ *See* 34 C.F.R. § 300.454(a) (2000) (“No private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school.”).

children.²⁰⁴ Again, under the current IDEA enactment, state and local educational agencies have no obligation to spend their own local funds to provide enhanced services to home-educated students—they need only disperse the federal grant money.²⁰⁵ Similarly, home-schooled children are not guaranteed the provision of special education services *within* their home because local educational agencies retain discretion to decide where the services are provided and therefore may decide only to supply “off-site” assistance.²⁰⁶ Thus, once again, if services prove essential to the child’s learning within the classroom, and parents cannot afford such services if denied funding for on-site provision, these children may be deprived of an “appropriate” educational opportunity, or else the parents may be pressured to enroll their child in the public school anyway.²⁰⁷

VI. LEGISLATIVE RECOMMENDATIONS

Because the current version of the IDEA does not provide for home-educated students with disabilities, state and federal legislators must take action. Congress could choose to leave the IDEA as is, depending on state legislators to correct this oversight. However, the better option is for Congress to change the federal statute, thus integrating home-educated students into the IDEA legislative scheme. This part discusses these options for change and also preemptively attempts to rebut the funding concerns regarding the impact of such a change.

A. State and Federal Initiatives

Congress could choose to take no action regarding the IDEA, simply leaving the federal statute’s provisions unchanged while waiting for the states to initiate their own internal changes. A minority of states currently recognize home schools as private schools;²⁰⁸ therefore, these states are already subject to the IDEA, and others may follow suit by redefining “private school” to include home education. Other states may instead follow Nevada’s example by amending state law to include a separate provision for home-schooled students—specifically allowing those students legally exempted from compulsory attendance statutes to be included in the public school districts’ special education programs.²⁰⁹ However,

²⁰⁴ See 20 U.S.C. § 1412(a)(10)(A)(i); *supra* notes 131–35 (describing in more detail the determination of federal funding).

²⁰⁵ See Traub, *supra* note 133, at 686 (“In fact, as the amendments now stand, it is more beneficial for the public school district if the parents of handicapped children choose to place them in private educational settings [because] [u]nilaterally placed children cost the school district nothing . . .”).

²⁰⁶ See *supra* note 134 and accompanying text (explaining the breadth of the local educational agency’s discretion).

²⁰⁷ See *supra* notes 136–46 and accompanying text (discussing the possible pressure on current private school parents since the 1997 Amendments).

²⁰⁸ See *supra* note 68.

²⁰⁹ Nevada law provides that:

reliance upon the states for adaptation could drag out for countless years, while deserving children's opportunities for assistance elude them. The better choice for reconciling the home education inconsistency among the states (and in a more timely fashion) is for Congress to intervene.²¹⁰

Although numerous ways surely exist for changing the IDEA framework to integrate home-schooled students' participation, this note presents three options, each placing varying degrees of pressure upon the states to guarantee change.²¹¹

1. *Creation of a Bypass Provision Similar to the Private School Provision*²¹²

A home school bypass provision mirroring the private school provision would be the most indirect method of bringing about state change. Such a provision would allow the Secretary of Education to bypass the local educational agency for its failure, or inability, to provide Part B participation of home-schooled children.²¹³ States would not be automatically forced to change their

The board of trustees of each school district shall provide programs of special education and related services for children who are exempt from compulsory attendance . . . and receive instruction at home. The programs of special education and related services required by this section must be made available:

(a) Only if a child would otherwise be eligible for participation in programs of special education and related services

....

(c) In accordance with the same requirements set forth in 20 U.S.C. § 1412 which relate to the participation of pupils with disabilities who are enrolled in private schools within the school district voluntarily by their parents or legal guardians.

NEV. REV. STAT. ANN. 392.070(2) (Michie 2000). Interestingly, the statute specifically analogizes home schools to private schools.

²¹⁰ Making federal inroads into the states' educational territory is certainly not new to Congress. In fact, Congress passed the IDEA in the first place because the states had not made acceptable advances in the provision of disabilities education without federal initiative. *See supra* notes 97–100 and accompanying text (indicating the states' exclusion of children with disabilities and inadequate special education services).

²¹¹ Each option is not necessarily exclusive. Congress could choose to use a variety of approaches.

²¹² *See* 20 U.S.C. § 1412(f) (1994 & Supp. IV 1998) (announcing, in part, that if "a State educational agency is prohibited by law from providing for the participation in special programs of children with disabilities enrolled in private elementary and secondary schools," then the Secretary of Education would arrange for the requisite services and thereafter withhold from the state's federal allocation the estimated amount necessary to pay for the services). This bypass would continue until the state agency became able to comply. *Id.* The section also provides an opportunity for the state and/or local educational agency to be notified and heard by the Secretary or the Secretary's designee in order to object to the bypass. *See also* 34 C.F.R. §§ 300.480–487 (2000).

²¹³ *Cf.* 20 U.S.C. § 1412(f)(1); H.R. REP. NO. 93-805, at 541 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4093, 4109 (describing the similar effect of the original enactment of the private school bypass provision, prior to its inclusion in the IDEA).

laws to include home-educated students as private school students. Instead, the Secretary of Education would provide the services directly, through a separate program funded by the local educational agency's federal allocations.²¹⁴ Although the state would have their overall federal allotment reduced, the allotment would not be completely withheld.²¹⁵ However, this option would only work as long as the state law or local practice (such as the old Nevada school board policy at issue in *Hooks*)²¹⁶ specifically forbids the participation of home-schooled children within the state's IDEA program.

2. Addition of a Definition for "Private School" that Includes Home Education

The inclusion within the IDEA's definitional section²¹⁷ of a meaning for "private school"²¹⁸ that encompasses home education would provide the heaviest pressure upon the states to integrate homeschoolers into their IDEA programs for private school students. Because Congress adopted the IDEA pursuant to its spending power,²¹⁹ Congress can place conditions upon the receipt of federal grant money provided under the statute.²²⁰

This additional definition would create an acceptable federal funding contingency, forcing the states to choose between compliance or loss of federal grant assistance.²²¹ The statute already affords for the withholding, in whole or in

²¹⁴ See 20 U.S.C. § 1412(f)(2)(A).

²¹⁵ See 20 U.S.C. § 1412(f)(2)(B). Even without the complete withholding of funds, states may feel compelled to change their law or practice in order to eliminate the federal government's increased oversight of the state program.

²¹⁶ Prior to state legislative action (through Nevada Revised Statute 392.070), the Nevada Department of Education upheld a school district's policy that asserted that students granted the home-education exception did "not have access to instruction and/or ancillary services with the public schools." *Hooks v. Clark County Sch. Dist.*, 228 F.3d 1036, 1038 (9th Cir. 2000).

²¹⁷ 20 U.S.C. § 1411 (1994 & Supp. IV 1998).

²¹⁸ Or alternatively, "private forms of education."

²¹⁹ The spending power is derived from Congress' enumerated powers. See U.S. CONST. art. I, § 8.

²²⁰ See *Pennhurst State Sch. v. Haldermann*, 451 U.S. 1, 17 (1981) ("Turning to Congress's power to legislate pursuant to the spending power, our cases have long recognized that Congress may fix the terms on which it shall disburse federal money to the States.").

²²¹ A clear definition would provide the states with notice of the extent of their obligation should they accept the federal grant. Imposing a burden on the states to provide for home-educated students under the current statute would be troublesome because the statute is somewhat ambiguous as to its application to these students. See *supra* Part V.A (presenting a statutory analysis of the IDEA provisions relating to "private schools"). As the Supreme Court has repeatedly emphasized, "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Bd. of Educ. v. Rowley*, 458 U.S. 176, 203 n.26 (1982); see also *Cedar Rapids Cmty. Sch. Dist. v. Garret F.*, 526 U.S. 66, 83-84 (1999) (Thomas, J., dissenting). This principle is based on the conception of federal funding contingencies as contracts between the federal government and the state participants:

[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in

part, of payments to a state or local educational agency when they have failed to comply substantially with the Act's provisions.²²² This new provision would therefore serve as one additional requirement for the states' entitlement to funds.²²³ Again, the federal government would not be directly forcing the states to change their laws,²²⁴ but through the use of the funding contingency, Congress would be creating an intensely strong incentive to do so.

3. *Provision of a Supplemental Grant Program*

Congress's provision of a competitive supplemental grant program targeting home-schooled students would serve as an alternative federal funding contingency that Congress could utilize to ensure the integration of home-schooled children into the IDEA. States that are faced with a significant number of home-educated students desiring assistance could apply to qualify for additional monetary support—above and beyond the regular federal allocation under the IDEA—to improve their programs to meet these extra needs. For example, the 1997 Amendments to the IDEA included the “State Improvement Grant” program, giving states additional funds for improving “special and general education services for students with disabilities.”²²⁵ Congress specifically sought to assist “the professional development of educators, administrators and related

return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'

Rowley, 458 U.S. at 203 n.26 (quoting *Pennhurst*, 451 U.S. at 17).

²²² See 20 U.S.C. § 1416 (1994 & Supp. IV 1998) (giving the Secretary of Education the power to withhold further payments to a state, after reasonable notice and an opportunity for a hearing, if “there has been a failure by the State to comply substantially with any provision under this subchapter” or “there is a failure to comply with any condition of a local educational agency's or State agency's eligibility”); 20 U.S.C. § 1411(a)(19) (1994 & Supp. IV 1998) (providing for the reduction of funds allocated to a state “for any fiscal year following the fiscal year in which the State fails to” sustain its level of financial support of special education and related services).

²²³ See *Rowley*, 458 U.S. at 183. (“[A]lthough the Act leaves to the States the primary responsibility for developing and executing educational programs for [disabled] children, it imposes significant requirements to be followed in the discharge of that responsibility.”). The Supreme Court recognized that the participating states must comply with the Act's requirements in order to avoid the withholding of federal funds. *Id.*

²²⁴ Such a direct intervention into the states' sovereignty would raise possible federalism problems because education exists within the states' domain. See *supra* note 54 (discussing the Tenth Amendment right of the states to govern the area of education).

²²⁵ Press Release, U.S. Department of Education, Office of Special Education and Rehabilitative Services, \$7.5 Million Awarded to Nine States to Improve State Services for Children with Disabilities (May 2, 2000), at <http://www.ed.gov/PressReleases/05-2000/0502b.html> (last visited Aug. 28, 2001) (“Under the competitive State Improvement Grant program, . . . states can apply for funding to reform and improve their systems for providing educational, early intervention, and transitional services.”).

services personnel.”²²⁶ Already twenty-seven of these state grant applications have been rewarded, totaling almost twenty-six million dollars in supplemental fund disbursements.²²⁷ The creation of a similar grant program benefiting home-schooled students would aid as a further incentive for states willingly to change their own legislation in a sincere effort to assist the *entire* population of children with disabilities.²²⁸

B. Combating the Funding Concern

The foremost problem confronting this country's education of the disabled centers around funding issues. Scholars criticize any broad judicial interpretation or legislative expansion of the IDEA's scope,²²⁹ accusing Congress of issuing an unfunded federal mandate that hurts the already financially strapped school systems²³⁰ and ultimately impacts the education of both disabled and non-disabled students.²³¹ These funding concerns have become more prominent since

²²⁶ *Id.* (noting that the states are required to use 75% of the money for their professional development needs and then can use the remaining money for “technical assistance and disseminating information about best educational practices to improve results for children with disabilities”).

²²⁷ *Id.* (declaring that nine states received grants in the year 2000, totaling seven and a half million dollars, while eighteen states received a total of eighteen million dollars in 1999). The United States Department of Education selects grantees “based on a comprehensive needs assessment.” *Id.* The twenty-seven selected thus far were chosen from among fifty-nine grant applications. *Id.*

²²⁸ In fact, Bush's proposed budget plan includes a one billion dollar increase for special education grants to states. See *Budget Briefing*, CONGRESSDAILY (Nat'l J.), Apr. 9, 2001, at 2001 WL 18129317. Some of this money could be used for a supplemental grant program for home-educated students.

²²⁹ See *Tobin P. Richer, County of San Diego v. California Special Education Hearing Office: A Misapplication and Drastic Expansion of IDEA Coverage*, 26(2) J.L. & EDUC. 1 (1997) (disapproving the Ninth Circuit's expansive interpretation—which allowed for the provision of medical, social, and emotional services as part of “free appropriate public education” and “related services”—because of the undeniable increase of financial burdens placed on the “already financially strapped public school system”).

²³⁰ See 143 CONG. REC. S4356 (daily ed. May 13, 1997) (statement of Sen. Gorton). Senator Gorton, a general opponent of the IDEA, argued that the statute constitutes an unfunded mandate imposed on state school systems. *Id.* He presented estimations (supplied by the Congressional Budget Office) for 1998, figuring that the states' costs for the IDEA would reach \$35 billion while the federal government would supply only approximately \$3–4 billion. *Id.* Gorton also attacked the narrow focus of the bill—a “free appropriate public education” for all disabled students—which created unlimited costs with no consideration for the impact on schools' overall budget and the non-disabled students. *Id.* Senator Jeffords responded by emphasizing that the IDEA is not just a “federal mandate,” but it is a “constitutional mandate” and a matter of equal protection. *Id.* at S4357.

²³¹ See Melisa C. George, *A New Idea: The Individuals with Disabilities Education Act after the 1997 Amendments*, 23 LAW & PSYCHOL. REV. 91, 110 (1999) (“[W]hile spending on special education has risen dramatically in recent years, spending on general education has fallen behind.”). For example, in one city, providing special education services to each disabled student costs approximately \$25,000 annually while providing services to a general education

the adoption of the amended federal funding formula²³² in 1997 and the Supreme Court's holding in *Cedar Rapids Community School District v. Garret F.* in 1999.²³³

Critics will certainly attack the proposed addition of home-schooled children into the IDEA framework as an expansion that makes the states' funding obligations even more unbearable. Admittedly, the federal funding of less than 10% of the disabilities education costs appears unreasonable.²³⁴ An overall funding change by Congress for the entire statute would unquestionably solve many of the problems faced by state school systems.²³⁵ But even if this increased

student costs only \$5611 annually. *Id.*

²³² See 20 U.S.C. § 1411 (1994 & Supp. IV 1998). Originally the IDEA utilized a child-count formula as the basis for distributing federal funds—paying a set amount for each child within the state that had disabilities. See H.R. REP. NO. 105-95, at 88 (1997), *reprinted in* 1997 U.S.C.C.A.N. 78, 85. The 1997 Amendments retained the child-count formula only for supplying a threshold amount of \$4,924,672,200 to each state. *Id.* Once the federal funding for a state meets this threshold, the funding formula now changes to one based on overall child population and poverty figures, as gathered from the national census. *Id.* (reporting that 85% of funds are based on the total school age population while 15% are based on poverty statistics).

Congress changed the formula because the child-count method supposedly resulted in the over-identification of children with disabilities. *Id.* at 86. Initially Congress wanted the funding formula to encourage states to proactively serve the needs of eligible children, so the child-count method increasingly rewarded states for identifying more disabled children. *Id.* Yet, Congress became concerned that this method led to the decreased scrutiny of each child's condition because additional monetary benefits were on the table. *Id.* (arguing that minority children especially fell victim to this incentive to manipulate the disabled student count). In spite of the change in formula, states retain the same obligation as previously held "to identify and serve children with disabilities." *Id.* at 85 ("[The] Committee wishes to make clear that the change [in federal funding] . . . should in no way be construed to modify the obligation of educational agencies to identify and serve children with disabilities.").

²³³ 526 U.S. 66; see also Andrew D. M. Miller, Note, *Irrelevant Costs and Economic Realities: Funding the IDEA after Cedar Rapids*, 62 OHIO ST. L.J. 1289, 1325 (2001) (arguing that the Court's decision in *Cedar Rapids*, which found cost as an irrelevant factor in a school district's provision of "related services" under the IDEA, represents an extreme rule that "will have severe financial implications for American public schools"). Miller asserts that Congress intended for cost to be a consideration, and therefore because of the Court's disregard for traditional principles of statutory interpretation and the economic realities of public schools, Congress will have to revisit the IDEA in order to remedy its now financially crippling application. See *id.* at 1325–26.

²³⁴ In fact, section 1411 of the original legislation (which remains current law today) set a maximum cap of 40% on federal grant expenditures to each state. 20 U.S.C. § 1411(a) (1994 & Supp. IV 1998). This section stated that:

The maximum amount of the grant a State may receive under this section for any fiscal year is (A) the number of children with disabilities in the State who are receiving special education and related services . . . multiplied by (B) [forty] percent of the average per-pupil expenditure in public elementary and secondary schools in the United States.

Id. This disparity between what was promised and what actually has been delivered gives the unfunded mandate criticism greater validity. See *supra* notes 229–31 and accompanying text.

²³⁵ With an increased funding base, the states obviously could provide more comprehensive special education services to a greater number of disabled students without

federal assistance never materializes,²³⁶ home-schooled children should still be integrated into the structure as private school students because the potential societal impact of excluding these students outweighs the possible financial impact.

First, Congress must consider the remedial purposes and long-term societal consequences of not integrating home-educated students into the IDEA. Some may argue that the cost is too great, yet others realize appropriately that failure to provide adequate education today will cost the country even more in the future.²³⁷ Congress created the IDEA not only due to equal protection concerns, but in order to advance adequate education for all children, which is the key to encouragement of success in life and good citizenship, awakening to cultural values, preparation for later professional training, and normal adjustment to the world.²³⁸ Additionally, children with disabilities who do not receive a complete education are "less likely to be employed, more likely to rely on public assistance, and substantially more likely to be involved in crime."²³⁹

Second, the financial impact of the integration will not prove as monumental as may be expected at first glance. The new legislation would simply guarantee equality of opportunity to *all* privately educated children with disabilities, allowing those home-educated students who voluntarily choose to take advantage of federal assistance to do so.²⁴⁰ Yet, just because the *option* is created does not mean parents will need or desire to take advantage of it. The numerous drawbacks

depleting funds needed for general education. State and local educational agencies might even have an incentive to supplement the proportional funding available to private school students. See *supra* note 133 (describing the current disincentive for local educational agencies to assist private school students beyond the federal allotment).

²³⁶ Currently, such an increase in direct funds to the states is *not* on the Bush Administration's agenda, although the states are crying out for such help. See *Bush Creates Working Group to Enhance States' Roles*, CONGRESSDAILY (Nat'l J.), Feb. 26, 2001, at 2001 WL 4817717 (describing a private meeting between Bush and the governors in which some governors showed dissatisfaction with Bush's plans for special education because they "do not include a spending increase" but only make it easier "for states to transfer funds out of other programs for use on special education"). The Administration admits, however, that the "discussion of funding increases for special education should be accompanied by a look at how to reform the program." *Bush, Cabinet Officials Defend Budget Against Criticism*, CONGRESSDAILY (Nat'l J.), Apr. 9, 2001, at 2001 WL 18129327 (noting, additionally, that "the costs of the [special education] program are 'exploding'") (from conversation with OMB Director, Daniels); see also *Administration Plays Down Cost of Education Measure*, CONGRESSDAILY (Nat'l J.), June 15, 2001, at 2001 WL 18130023 (noting that the special education program is not "on line for mandatory funding" and that "funding for special education ought to be discussed in the context of reforming the program").

²³⁷ See 143 CONG. REC. H2498 (daily ed. May 13, 1997) (statement of Rep. Scott) ("While some may argue that the price is too high, we know that our failure to provide appropriate education to any child will cost us even more in the long run . . .").

²³⁸ See *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954); see also *supra* notes 109–16 and accompanying text (describing the legislative purposes behind the statute).

²³⁹ See 143 CONG. REC. H2498 (daily ed. May 13, 1997) (statement of Rep. Scott).

²⁴⁰ See KLICKA, *supra* note 7, at 149 (noting that the IDEA was "established to make public school services *available* to all children on a *voluntary* basis") (emphases added).

previously discussed in this Note—including the limited services and state oversight concerns—will convince some parents that participating in the IDEA program is not worth the effort.²⁴¹ For those students being home schooled due to religious reasons,²⁴² many will probably still choose not to take part in the program in order to keep their distance from the public school system as much as possible.²⁴³ For those students being home schooled due to non-religious reasons, such as safety²⁴⁴ and quality of education²⁴⁵ concerns, many more will return into the traditional school setting anyway,²⁴⁶ where the public schools will become *fully* responsible for their special education needs, as public schools improve.²⁴⁷

VII. CONCLUSION

Every disabled child should be given an equal opportunity to be educated, yet Congress did not provide for home-educated children within the federal disabilities education scheme.²⁴⁸ Whether this hole in the IDEA resulted from a complete non-consideration of the home school population or from a perception that homeschoolers represent an insignificant portion of students, this note calls for a future amendment to the IDEA to include this important segment of students.²⁴⁹ Inclusion of home-educated students within the IDEA follows logically from the states' overall treatment of private education. Among other things, if parents truly have the freedom to educate their children as they choose;²⁵⁰ if home schooling satisfies state compulsory attendance requirements just like private schools;²⁵¹ and if federal money may be distributed for the

²⁴¹ See *supra* Part V.C (discussing the negative implications of analogizing home schools to private schools); see also *supra* notes 79–81 and accompanying text (describing the raging debate, which even splits the home school community, over whether home-schooled children should completely sacrifice all public school services when choosing to be excepted from compulsory public school attendance).

²⁴² See *supra* note 60 (discussing the prominence of home schooling for religious reasons).

²⁴³ Many parents do not want to risk exposing their children to the school's culture or regulations at any cost. See Cloud, *supra* note 77, at 132 (noting that many parents question "[w]hat's the point of being home schooled . . . if banging down the [school] door exposes you again to the culture—and the regulations—inside?").

²⁴⁴ See *supra* note 62 (discussing the safety reasons for home schooling).

²⁴⁵ See *supra* note 63 (discussing the academic reasons for home schooling).

²⁴⁶ See GORDON ET AL., *supra* note 45, at 55 (noting that "the vast majority of students return to or enter school outside of the home by the ninth grade"). These authors argue that the lines of communication between the public school and parents should remain open. *Id.* This logic seems even more important when dealing with students with disabilities in order properly to meet their needs if and when they enter into the public school system.

²⁴⁷ Improvement is more likely in the wake of the new presidency and the reform movement. See *supra* notes 2, 5 and accompanying text.

²⁴⁸ See *supra* Part V.A.

²⁴⁹ This note certainly does not claim to resolve the financial intricacies of such a change to the federal IDEA statute, but it focuses instead on the need for change, leaving the details of precise legislation to Congress.

²⁵⁰ See *supra* note 39 and accompanying text.

²⁵¹ See *supra* notes 68–69 and accompanying text.

subsidization of private school education;²⁵² then homeschoolers should not be excluded from equal access to this federal aid.²⁵³ With the popular focus on education, the 107th Congress currently sits in an opportune position to reconsider the IDEA and integrate home-educated children into the structure, thus guaranteeing that the IDEA's purposes are fulfilled for *all* children with disabilities.²⁵⁴

²⁵² See *supra* Part IV.B.

²⁵³ See *supra* Part V.B.

²⁵⁴ . . . so that *no* child is left behind.